Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROBERT J. ADAMS & ASSOCIATES, LAW OFFICES OF MELVIN JAMES KAPLAN AND ZALUTSKY & PINSKI, LTD., PETITIONERS

v.

ALBERT BETHEA, CORT CHUBKO, AND NATHANIEL BEARD, JR., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The federal circuits are divided on the dischargeability of fees for attorneys representing debtors in bankruptcy cases: Does 11 U.S.C. § 329 authorize a debtor's attorney to collect a reasonable fee postpetition as well as prepetition?

2. The Supreme Court may exercise its supervisory power where a circuit court of appeals departs from the accepted and usual course of judicial proceedings: Did the Seventh Circuit Court of Appeals err in deciding an issue not presented by the pleadings, not argued by the parties, and not decided by the district court?

PARTIES TO THE PROCEEDING

Petitioners are three law firms, Robert J. Adams & Associates, Law Offices of Melvin J. Kaplan, and Zalutsky & Pinski, Ltd. There is no parent or publicly held company owning 10% or more of any of the law firms' stock. Respondents are individuals, former clients of the law firms, and former Chapter 7 debtors, Albert Bethea, Cort Chubko and Nathaniel Beard, Jr. Respondents purported to sue on behalf of similarly situated others, but no class has been certified.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Robert J. Adams & Associates, Law Offices of Melvin James Kaplan and Zalutsky & Pinski, Ltd., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit (Pet. App. 1a – 17a) is published at 352 F.3d 1125. The opinion of the district court (Pet. App. 18a – 28a) is published at 287 B.R. 906, and the opinion of the bankruptcy court (Pet. App. 29a-52a) is published at 275 B.R. 284.

JURISDICTION

The Court of Appeals issued its opinion on December 17, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

Section 329 of the Bankruptcy Code (11 U.S.C. § 329)

§ 329. Debtor's transactions with attorneys.

> (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a

statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the sources of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to –

(1) the estate, if the property transferred-

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

Section 362 of the Bankruptcy Code (11 U.S.C. § 362)

§ 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of –

* * *

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title. ...

Section 524 of the Bankruptcy Code (11 U.S.C. § 524)

§ 524. Effect of discharge.

(a) A discharge in a case under this title –

* * *

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived ...

Section 727 (11 U.S.C. § 727)

§ 727. Discharge.

(a) The court shall grant the debtor a discharge. ...

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter. ...

STATEMENT

More than one million chapter 7 bankruptcies are filed in this country each year, most of them "no asset" consumer bankruptcies. In many cases, debtors pay fees and costs to their attorneys before filing, but in a substantial number of cases, the poorest of the poor pay fees and costs over time, after the filing of their petitions. Section 329 of the Bankruptcy Code expressly contemplates these arrangements, regulating debtor's attorney fees "paid or agreed to be paid ..., for services rendered or to be rendered in contemplation of or in connection with the case." 11 U.S.C. § 329(a). Nonetheless, the Seventh Circuit held in this case that postpetition payments to debtors' attorneys violate the automatic stay and discharge provisions of the Code.

Moreover, the divided panel reached out to decide an issue that was neither raised by the pleadings, nor argued by the parties, nor decided by the district court. In their complaint, the debtors sought to recover postpetition payments for prepetition services,

and the parties limited their arguments to this issue. But the Seventh Circuit ruled *sua sponte* that fees for postpetition services were discharged as well. The majority recognized that its opinion created a conflict with the Ninth Circuit concerning the treatment of compensation for debtors' attorneys under the Bankruptcy Code. This case has great significance for the many debtors and lawyers involved in chapter 7 cases each year, for the bankruptcy system in general, and for those concerned with preserving the adversary system of adjudication.

1. The Bankruptcy Code provides for liquidation in chapter 7, and for different categories of reorganization in chapters 9, 11, 12 and 13. Section 362 of the Code stays any act to collect a claim against the debtor that arose prior to the filing of a bankruptcy petition. 11 U.S.C. § 362(a)(6). Section 727 discharges the debtor from those same debts, and Section 524 enjoins any act to collect a discharged debt. 11 U.S.C. §§ 727(b), 524 (a)(2). These provisions are essential to relieve debtors of the financial pressures that drove them into bankruptcy, to allow a fair and orderly liquidation, and to afford a "fresh start" to honest but distressed debtors. House Report No. 595, 95th Cong., 1st Sess., 340, 384 (1977); Senate Report No. 989, 95th Cong., 2d Sess., 49, 98 (1978).

In order to obtain the benefits of the automatic stay and discharge provisions, a debtor must determine which chapter of the Code to proceed under, file a bankruptcy petition along with required schedules, attend a creditors meeting, respond to motions and adversary complaints, send appropriate notices, deal with creditors asserting security interests or

requesting reaffirmation agreements, and establish eligibility for a discharge. Congress recognized that debtors would require the assistance of competent professionals to navigate the bankruptcy process successfully, and provided for the employment and compensation of professionals in chapter 3 of the Code governing case administration. See 11 U.S.C. §§ 327-331.

This case involves the relationship between bankruptcy debtors and their attorneys in chapter 7 cases. Section 329(a) requires a debtor's attorney to disclose compensation "paid or agreed to be paid ... for services rendered or to be rendered in contemplation of or in connection with" the bankruptcy case. 11 U.S.C. § 329(a). Section 329(b) requires the bankruptcy court to scrutinize those fees and agreements on a standard of reasonableness, and to cancel the agreement or require the return of payments to the extent excessive. 11 U.S.C. § 329(b). Thus, Congress explicitly recognized that there would be some cases in which debtors would have paid their attorneys before their petitions were filed, and there would be other cases in which debtors would not have paid their attorneys but would have agreed to pay after their petitions were filed.

2. Respondents Albert Bethea, Cort Chubko and Nathaniel Beard, Jr., ("Debtors") hired Petitioners Robert J. Adams, Law Offices of Melvin James Kaplan and Zalutsky & Pinski, Ltd. ("Law Firms"), respectively, to represent them in bankruptcy proceedings. The Debtors agreed to pay the Law Firms in installments, and executed retainer agreements to that effect. The Law Firms filed chapter 7 bankruptcies on behalf of the Debtors, and prosecuted

those bankruptcies to discharge. Some time after their cases were closed, the Debtors brought adversary complaints against the Law Firms. The Debtors alleged that the Law Firms had violated the automatic stay and discharge provisions of the Bankruptcy Code by collecting fees for prepetition work after filing the Debtors' bankruptcy petitions. (Pet. App. 30a-31a.)

The Law Firms moved to dismiss, arguing that their fees were governed by Section 329 of the Code, not by the automatic stay and discharge provisions. The bankruptcy court granted the Law Firms' motion and dismissed the Debtors' complaint. Judge Barliant reasoned that the Bankruptcy Code had to be interpreted as a whole, not in its isolated parts, and that application of the automatic stay and discharge provisions to debtors' attorneys fees rendered Section 329 superfluous for fees "agreed to be paid" in chapter 7 cases. (Pet. App. 36a-37a.) The bankruptcy court found that debtors' attorney fees were qualitatively different from the claims of general creditors in that agreements between debtors and bankruptcy counsel were fundamental to the success of the bankruptcy. (Pet. App. 45a.)

3. The district court affirmed dismissal of the Debtors' complaint, noting that Debtors did not allege that the fees were unreasonable or that the Law Firms did not earn them. (Pet. App. 19a.) According to the district court, not only did the application of the automatic stay and discharge provisions render the "agreed to be paid" language in Section 329 superfluous, it also conflicted with the "reasonable value" standard for debtor's attorney fees set by Section 329, and intended by Congress to be

substantive. (Pet. App. 23a.) The district court concluded that Section 329 specifically regulated the compensation of debtors' attorneys in bankruptcy cases, and could not be circumvented by resort to the more general automatic stay and discharge provisions. (Pet. App. 21a-22a.)

The district court observed that Section 329 of the Code was derived from Section 60(d) of the Bankruptcy Act of 1898 and former Bankruptcy Rule 220. For three-quarters of a century, courts had recognized that Section 60(d) was designed to protect the debtor's right to counsel by enabling the debtor to make provision for the reasonable compensation of counsel. See *In re Wood*, 210 U.S. 246, 253 (1908); *In re Falk*, 30 F.2d 607, 609 (2d Cir. 1929); *Caldwell v. Valley National Bank*, 208 F.2d 645, 646 (10th Cir. 1953). Judge Zagel found nothing in the Bankruptcy Code or its legislative history to indicate that Congress intended to diminish the ability of debtors to make provision for reasonable attorneys fees, and to the contrary, Section 329 protected that right. (Pet. App. 24a-25a.)

4. The Debtors appealed and a divided panel of the Seventh Circuit vacated the judgment and remanded. The Seventh Circuit found that there was no conflict in statutory terms because even if the fees of debtors' attorneys were discharged, Section 329 continued to operate in chapter 7 cases (1) as to prepaid fees; (2) as to fees incurred during the bankruptcy proceeding; (3) as to reaffirmed fees; and (4) as to fees incurred by lawyers fired by the debtor and rehired by the estate. (Pet. App. 4a.) The Seventh Circuit explained that the second situation could arise where

the debtor hired one attorney to perform prepetition work, then hired another attorney postpetition to prosecute the case. In the second and fourth situations, the court commented, legal fees would receive "administrative priority." (Pet. App. 4a-5a.)

Rather than simply vacating the dismissal order and remanding for further proceedings on the Debtors' complaint, the panel majority addressed whether fees for services rendered postpetition were discharged. The majority made no mention of the Debtors' complaint, but acknowledged that the Debtors were accepting the conclusion of *In re Hines*, 147 F.3d 1185 (9th Cir. 1998) for the purpose of the case. In *Hines*, the Ninth Circuit had ruled that postpetition fees were not discharged. Although the parties had not argued the matter, and the district court had not decided it, the panel majority ruled that postpetition fees were discharged, creating a clear conflict with the Ninth Circuit. (Pet. App. 6a-8a.)

Judge Cudahy concurred with the majority that fees for prepetition work were discharged, but dissented from the ruling on postpetition fees. In addition to the legislative history of Section 329, Judge Cudahy pointed to Bankruptcy Rule 1006, which requires postpetition payment for prepetition work, as evidence that Congress did not intend prepetition fees to be discharged. (Pet. App. 9a-10a.) Notwithstanding the "awkwardness" of the relationship between Section 329 and the automatic stay and discharge provisions, Judge Cudahy found no conflict clear enough to defeat discharge. But he dissented from the decision to address postpetition fees, reasoning that it was inconsistent with "ordinary principles of the adversary

system" to decide issues not raised by the parties. (Pet. App. 11a-12a.)

5. The Debtors' second amended complaint purported to state claims under 11 U.S.C. §§ 362 and 524, and a related claim under the common law of the state of Illinois. The district court had jurisdiction of the claims arising under the Bankruptcy Code pursuant to 28 U.S.C. § 1334(a), and jurisdiction of the related claim pursuant to 28 U.S.C. § 1334(b). These claims were heard in the bankruptcy court in the first instance pursuant to 28 U.S.C. § 157. The bankruptcy court entered a final judgment on March 28, 2002, and Debtors filed a notice of appeal to the district court on April 8, 2002. The district court had jurisdiction of the appeal pursuant to 28 U.S.C. § 158(a).

The district court entered a final judgment affirming the decision of the bankruptcy court on January 3, 2003. Debtors filed a notice of appeal to the court of appeals on January 31, 2003. The court of appeals had jurisdiction of the appeal pursuant to 28 U.S.C. § 158(d). The court of appeals issued its opinion vacating and remanding on December 17, 2003. The Law Firms request that this Court grant certiorari to review the judgment of the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

1. The dischargeability of debtors' attorneys fees is the subject of a widening conflict among the circuit courts of appeals. The Ninth Circuit has ruled that fees for prepetition work which remain unpaid at the filing of the petition are subject to the automatic stay and discharge provisions of the Bankruptcy Code,

but fees for postpetition work are not stayed or discharged. *In re Hines*, 147 F.3d 1185 (9th Cir. 1998). Acknowledging that its opinion "creates a conflict with the ninth circuit's holding in *Hines*," the Seventh Circuit has ruled that all fees not paid prior to the filing of the petition, for work done prepetition and postpetition, are stayed and discharged. *Bethea v. Robert J. Adams & Associates*, 352 F.3d 1125, 1129 (7th Cir. 2003).

The Ninth Circuit reaffirmed its position in *In re Sanchez*, 241 F.3d 1148 (9th Cir. 2001). The Second Circuit recently adopted the Ninth Circuit's position, referring to both *Bethea* and *Sanchez*. *In re Fickling*, ____ F.3d ____, 2004 WL 388967 (2d Cir. 3/3/04). Lower courts in two other circuits have addressed the issue, with mixed results. Two bankruptcy courts in the Sixth Circuit have held that prepetition fees are discharged, but not postpetition fees. *In re Chandlier*, 292 B.R. 583 (Bankr. W.D. Mich. 2003); *In re McNickle*, 274 B.R. 477 (Bankr. S.D. Ohio 2002). Three bankruptcy courts in the Tenth Circuit have taken three different positions. In *In re Martin*, 197 B.R. 120 (Bankr. D. Colo. 1996), the court held that prepetition fees were discharged in chapter 7 cases. In *In re Haynes*, 216 B.R. 440 (Bankr. D. Colo. 1997), the court held that prepetition fees were discharged in all bankruptcy cases, not just chapter 7 cases. In *In re Perry*, 225 B.R. 497 (Bankr. D. Colo. 1998), the court held that neither prepetition nor postpetition fees were discharged.

This split of authority concerning the obligations of court, counsel and debtors under the Bankruptcy Code is intolerable. The Bankruptcy Code is a federal

statute of nationwide application, both comprehensive in scope and complex in its balancing of interests. The bankruptcy court in Chicago should not be enforcing a different Code than the bankruptcy courts in Los Angeles and Denver. Debtors should not be forbidden from entering into enforceable installment agreements with counsel in Chicago, permitted to do so in Denver, and both forbidden in part and permitted in part in Los Angeles. The ability of a debtor's attorney to collect a fee should not depend on the location of his or her practice.

The ability of debtors and their attorneys to enter into enforceable fee agreements is of vital importance to the administration of justice in the bankruptcy system. More than one-and-a- half million bankruptcies were filed in the United States in 2002, more than one million of them filed under chapter 7. Administrative Office of the United States Courts, *2002 Annual Report of the Director: Judicial Business of the United States Courts* (U.S. Gov't. Printing Office, Washington, DC., 2003) pp. 26-28. While the number of bankruptcies increased 72% from 1992 to 2002, the number of bankruptcy judgeships has stayed the same, causing bankruptcy caseloads to nearly double. *Id.*, p. 28.

Recognizing that competent attorneys were essential to "enable the system to operate smoothly, efficiently and expeditiously," Congress set the standard for compensation at the reasonable value of services rendered so that competent counsel would be attracted to the bankruptcy field. House Report No. 595, 95th Cong., 1st Sess., 329-30 (1977); Senate Report No. 989, 95th Cong., 2d Sess., 41 (1978). The ability of

debtors to pay their attorneys reasonable compensation takes on greater significance because it is now clear that attorneys for debtors may not be compensated from bankrupt estates, at least in chapter 7 proceedings. *Lamie v. United States Trustee*, 540 U.S. ____ (2004). The inability of debtors to make enforceable agreements for the reasonable compensation of counsel will burden the bankruptcy system by increasing the number of *pro se* filings, decreasing the number of competent attorneys attracted to the bankruptcy field, or both.

The ability of debtors to enter into enforceable agreements with their attorneys is also crucial to the right of chapter 7 debtors to have the aid and advice of counsel. The official House and Senate Reports on Section 329 of the Bankruptcy Code state that this section was "derived in large part from current Bankruptcy Act § 60(d)." House Report No. 595, 95th Cong., 1st Sess., 329 (1977); Senate Report No. 989, 95th Cong., 2d Sess., 39 (1978). Nearly a century ago, this Court commented on the evident purpose of Section 60(d):

> It recognizes the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses and probable failure. It recognizes the right of such a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provision for reasonable compensation to his counsel. And, in view of the circumstances, the act makes provision that the bankruptcy

> court administering the estate may, if the trustee or any creditor questions the transaction, re-examine it with a view to a determination of its reasonableness.

In re Wood, 210 U.S. 246, 253 (1908) (emphasis added). Throughout the history of the old Act, courts continued to make the connection between the right to counsel in bankruptcy cases and the ability of debtors to make provision for the reasonable compensation of counsel. *See, e.g. Caldwell v. Valley National Bank*, 208 F.2d 645, 646 (10th Cir. 1953); *In re Falk*, 30 F.2d 607, 609 (2d Cir. 1929).

Where Congress intends for legislation to change a judicial interpretation, it clearly expresses that intention. *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 501 (1986) (commenting that this rule of statutory construction is followed with particular care in construing bankruptcy codifications). By enacting Section 329 of the Code, Congress carried forward the purpose of Section 60(d), to afford debtors the right to counsel by enabling them to make provision for the reasonable compensation of counsel. Only this Court can resolve the conflict among the circuits on this issue of importance for the administration of the bankruptcy system and the scope of debtors' right to counsel in bankruptcy cases.

2. The decision of the Seventh Circuit to reach an issue neither raised by the pleadings nor argued by the parties constitutes a departure so far from the usual course of judicial proceedings as to call for the exercise of this Court's supervisory power. The

business of federal courts is limited to questions presented in an adversary context. *Flast v. Cohen*, 392 U.S. 83, 95 (1968). "[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error," *Mackey v. Montrym*, 443 U.S. 1, 13 (1979), because the "clash of adverse parties sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions," *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 382 (1980) (internal quotes omitted).

In this case, Debtors filed a second amended complaint seeking to recover fees for *pre*petition work which were paid postpetition. The complaint raised no issue concerning postpetition payment for *post*petition work. On appeal, the parties addressed postpetition payment for *pre*petition work at great length, but the parties addressed postpetition payment for *post*petition work not at all. Yet the Seventh Circuit reached out to decide the legal status of postpetition payments for postpetition work without any complaint raising the issue, without any party arguing the issue, and with no judgment of the court below upon the issue. As the dissent commented, this was a decision outside the "ordinary principles of the adversary system." (Pet. App. 12a.)

This Court has held that "The fundamental requisite of due process of law is the opportunity to be heard." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). This case is like *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000), where the Court found a due process violation in the simultaneous

amendment of the pleadings and entry of judgment thereon. Here, the Seventh Circuit addressed an issue not raised by the pleadings, decided the issue, and purported to order payment without giving the Law Firms an opportunity to answer the complaint, assert affirmative defenses, conduct discovery or present witnesses.

A more fundamental deprivation of due process would be difficult to imagine. The Seventh Circuit explained that the issue had to be reached to determine whether to "reverse outright ... or remand for apportionment," but this dilemma was fictitious: The appeal was from an order dismissing the complaint, and a reversal would have reinstated the complaint and sent the parties back to the trial court to proceed on the complaint. The appeal did not require the Seventh Circuit to reach the issue of apportionment. This is a clear instance of a federal court deciding an issue not presented to it. The integrity of the adversary system and due process of law call for the exercise of this Court's supervisory power.

3. Certiorari is also warranted because the Seventh Circuit's interpretation of the Bankruptcy Code is in error. Congress intended that transactions between debtors and their attorneys relating to their bankruptcy cases be regulated by Section 329 of the Bankruptcy Code. The Seventh Circuit's interpretation flies in the face of the plain meaning of Section 329, the evident purpose of the statute, and both the historical and contemporaneous interpretation of the relevant statutory language.

a. Section 329 of the Code governs the fees of "[a]ny attorney representing a debtor in a case under [the Bankruptcy Code], or in connection with such a case." 11 U.S.C. § 329(a). Pursuant to Section 329, attorneys representing debtors must disclose the amount, source and terms of all "compensation paid or agreed to be paid ... for services rendered or to be rendered in contemplation of or in connection with the case." 11 U.S.C. § 329(a). Congress delegated the task of monitoring each debtor's attorneys fees to the bankruptcy court presiding over the case, and set the legal standard for those fees at "the reasonable value of any such services." 11 U.S.C. § 329(b).

Section 329 provides its own remedies for noncompliance or excessive fees. The bankruptcy court may cancel the agreement or order the return of the excess, either to the estate or to the one who paid. 11 U.S. C. § 329(b). Review of fees under Section 329 is *sui generis*, regulating the relationship between debtors and debtors' attorneys as officers of the court: The unique nature of Section 329 is highlighted by its inclusion with the Code provisions governing the employment and compensation of professionals. *In re Rheuban*, 128 B.R. 551, 558-60 (Bankr. C.D. Cal. 1991). Courts have an affirmative duty to review the reasonableness of fees disclosed. *In re Yermakov*, 718 F.2d 1465 (9th Cir. 1983).

Section 329 serves the same purpose as to debtors' attorneys fees that the automatic stay and discharge provisions serve as to general creditors. Congress recognized the need to protect both creditors and debtors with respect to debtors' attorneys fees, and designed Section 329 specifically for that purpose. H.R.

Rep. No. 595, 95th Cong., 1st Sess. 329 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 39 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5963, 6285, 5787, 5825. This case involves the fees of attorneys representing debtors in cases under the Bankruptcy Code. Congress specifically provided for court supervision of fees paid or agreed to be paid, for services rendered or to be rendered. Courts are required to apply a reasonable value standard to any such services, whether paid or agreed to be paid, whether rendered prepetition or postpetition. Section 329 clearly applies here.

"A general statutory rule usually does not govern unless there is no more specific rule." *Green v. Bock Laundry Machine Co.*, 490 U. S. 504, 524 (1989). The automatic stay and discharge provisions contain general rules of general applicability: Section 329 sets forth specific procedures and remedies that apply only to attorneys representing debtors in contemplation of or in connection with their bankruptcy cases. Section 329 specifically regulates the fees paid or agreed to be paid by these Debtors to these Law Firms.

b. Prior to the enactment of the Bankruptcy Code in 1978, debtors' attorneys fees were governed by two sections of the Bankruptcy Act of 1898, as amended. Fees paid prepetition were governed by Section 60(d), which avoided the preference rules of the old Act, and instead subjected those fees to court supervision on a standard of reasonableness. 11 U.S.C. § 96(d) (1978). By contrast, fees paid postpetition were governed by Section 64(b) of the Act, which provided for priority and payment from the estate. See 11 U.S.C. § 104(b) (1978).

In enacting Section 329 of the Bankruptcy Code of 1978, Congress consciously chose the approach of old Section 60(d), court supervision on a standard of reasonableness. The official House and Senate Reports on Section 329 state that this section was "derived in large part from current Bankruptcy Act § 60(d)." H.R. Rep. No. 595, 95th Cong., 1st Sess. 329 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 39 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5963, 6285, 5787, 5825. Moreover, Congress explicitly broadened the scope of Section 329, extending the Section 60(d) approach to "agreements" as well as "payments," and to services rendered "in connection with" the bankruptcy as well as "in contemplation" of it. Compare 11 U.S.C. § 329 with 11 U.S.C. § 96(d) (1978).

For many years prior to the 1978 Code, courts recognized that Section 60(d) of the Act was designed as much to protect the debtor's right to counsel as it was to control the compensation of counsel. In the first decade of the Bankruptcy Act's operation, this Court commented on the evident purpose of the statute:

> It recognizes the right of such a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provision for reasonable compensation to his counsel.

In re Wood, 210 U.S. 246, 253, (1908). The Court noted that Section 60(d) was *sui generis*, administrative in character, the subject of proceedings "both simple and summary," the attorney being "an officer of the court." 210 U.S. at 253, 257.

This view of Section 60(d) prevailed for more than three-quarters of a century under the old Act. *See, e.g., In re Falk*, 30 F.2d 607, 609 (2d Cir. 1929) ("The object of section 60(d) was to afford the bankrupt representation by counsel, who would not have to take his chances as a general creditor, but might know that a reasonable fee was assured"); *Caldwell v. Valley National Bank*, 208 F.2d 645, 646 (10th Cir. 1953) (Section 60(d) "recognizes the right of a debtor ... to have the aid, advice and assistance of counsel and to make provision for reasonable compensation to such counsel"). See also *In re Haynes*, 216 B.R. 440, 444 (Bankr. D. Colo. 1997) (commenting on the longstanding practice of not discharging prepetition fees in chapter 13 cases).

This widely accepted and longstanding interpretation of Section 60(d) formed the background against which Congress passed Section 329. "When Congress amends the bankruptcy laws, it does not write on a clean slate." *Dewsnup v. Timm*, 502 U.S. 410, 419, 112 S.Ct. 773, 779, 116 L.Ed.2d 903 (1992) (internal quotes omitted). The normal rule of statutory construction, that if Congress intends for legislation to change a judicial interpretation, it clearly expresses that intention, is followed with particular care in construing bankruptcy codifications. *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 501, 106 S. Ct. 755, 759, 88 L.Ed.2d 859 (1986). This Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 563, 110 S.Ct. 2126, 2133, 109 L.Ed.2d 588 (1990).

There is nothing in the Bankruptcy Code nor in its legislative history to indicate that Congress intended to narrow the right of debtors to the advice and assistance of counsel in any way. There is nothing to indicate that Congress intended to diminish the ability of debtors to make provision for reasonable attorneys fees. To the contrary, Section 329 of the Code recognizes the right of debtors to the assistance of counsel, and protects that right by enabling debtors to make provision for the reasonable compensation of counsel. And Congress abolished the distinction between fees paid prepetition and fees paid postpetition, extending Section 329 to all fees of the debtor "paid or agreed to be paid." 11 U.S.C. § 329(a). The right to counsel in bankruptcy cases is the policy preference of Congress.

The bankruptcy court concluded that Congress designed Section 329 to afford debtors the right to counsel, carrying forward the "discrete, exclusive regulation" of fee agreements established by its statutory predecessor. *In re Bethea*, 275 B.R. 284, 293 (Bankr. N.D. Ill. 2002). The district court agreed, noting that courts historically have recognized the qualitative distinction between debtors' attorneys and general creditors "because the agreement between a debtor and his counsel is fundamental to the success of the bankruptcy case itself." *Bethea v. Robert J. Adams & Assoc.*, 287 B.R. 906, 910-11 (N.D. Ill. 2003). The Debtors in this case exercised their right to counsel by hiring the Law Firms to represent them in bankruptcy proceedings, and the Debtors made provision for reasonable compensation of counsel by agreeing to pay in installments. Neither the Debtors nor the Law Firms violated the Bankruptcy Code by doing so.

c. The Supreme Court prescribes rules for practice and procedure in bankruptcy cases. 28 U.S.C. § 2075. In 1979, the Court formed an Advisory Committee on Bankruptcy Rules, consisting of judges, scholars and practitioners to draft a complete set of rules implementing the new Bankruptcy Code. This Court transmitted these rules to Congress, which took no action to disapprove or amend, and the Bankruptcy Rules became effective August 1, 1983. 9 *Collier on Bankruptcy* (15th Ed. Rev. 2002) ¶ 1001.02[2]. The Bankruptcy Rules reveal a contemporaneous understanding that the Code permits postpetition payment for prepetition services.

Rules 2016 and 2017 implement Section 329 of the Code. See Fed. R. Bankr. P. 2016, 2017. Rule 2016(b) requires "[e]very attorney for a debtor" to file an initial statement of all compensation paid or agreed to be paid within 15 days of the filing of a bankruptcy petition, and further requires the attorney to file "a supplemental statement ... within 15 days after any payment or agreement not previously disclosed." Fed. R. Bankr. P. 2016(b). Rule 2017(a) provides for review of any payment by a debtor to an attorney before the filing of a petition, and Rule 2017(b) provides for the review of any payment "or any agreement therefor" after the filing of the petition. Fed R. Bankr. P. 2017.

Bankruptcy Rule 1006, implementing 28 U.S.C. § 1930, provides for the payment of bankruptcy filing fees in installments within 120 days after the filing of a bankruptcy petition, but Rule 1006(b)(3) prohibits any payment to the debtor's attorney before the filing fee is paid in full. Fed. R. Bankr. P. 1006(b). Rule 1006 codifies the longstanding practice under the former

Bankruptcy Act and rules. *See, e.g., In re Latham*, 271 F. 538 (N.D.N.Y. 1921). These rules necessarily recognize that attorneys representing debtors in connection with their bankruptcies may be paid, and may agree to be paid, postpetition.

In its opinion in this case, the Bankruptcy Court observed that Rule 2017(b) "would be nullified in Chapter 7 cases," and that Rule 1006(b) "makes no sense if the attorneys' fees cannot be collected postpetition." *In re Bethea*, 275 B.R. at 289, 295. While it is true that the Bankruptcy Rules may not abridge substantive provisions of the Code, 28 U.S.C. § 2075, it is equally true that rules propounded by the Supreme Court and approved by Congress are presumed not to abridge those provisions. *In re Moralez*, 618 F.2d 76, 78 (9th Cir. 1980) (resolving doubt about prior substantive law in favor of the understanding expressed by rule); *Matter of Decker*, 595 F.2d 185, 189 (3d Cir. 1979) ("strong presumption" in favor of consistency of rules with Code). The Bankruptcy Rules make sense only if the Code permits Chapter 7 debtors to make postpetition payments for prepetition legal services.

d. The Seventh Circuit's application of the plain meaning rule is unpersuasive. The Seventh Circuit concludes that there is no genuine conflict between Section 329 and the automatic stay and discharge provisions because even if legal fees are discharged, Section 329 "has plenty to do" in chapter 7 cases. (Pet. App. 4a.) However, the four uses of Section 329, as outlined by the Seventh Circuit, do not withstand analysis.

First, according to the Seventh Circuit, excessive prepaid fees would have to be recouped for the benefit of other creditors. This use of Section 329 is genuine, but it fails to give effect to the "agreed to be paid" language in Section 329.

Second, the judge must ensure the reasonableness of fees incurred during the proceeding itself. This use for Section 329 is puzzling, given the Seventh Circuit's further holding that fees for postpetition work are discharged as well. Why would a judge ensure the reasonableness of discharged fees? The Seventh Circuit explains one possibility later in its opinion. A deserving debtor who cannot prepay in full "can tender a smaller retainer for prepetition work and later hire and pay counsel once the proceeding begins." In other words, the debtor could make use of Section 329 by hiring two different lawyers, or by hiring the same lawyer twice. The Seventh Circuit suggests that postpetition fees in this situation would receive "administrative priority," but this is incorrect. See *Lamie v. United States Trustee*, 540 U.S. ____ (2004).

It would be astounding if Congress included the "agreed to be paid" language in anticipation of debtors hiring attorneys separately for prepetition and postpetition work. Under the local rules of the bankruptcy court for the Northern District of Illinois, and under the rules for most courts, an appearance by counsel is deemed to be "for all purposes in the bankruptcy case," and counsel may withdraw only with leave of court. *See, e.g.* United States Bankruptcy Court, Northern District of Illinois, Rules 2090-5(b) and 2091-1. Similarly, ethical rules limit the grounds available for withdrawal once an attorney has filed an

appearance in a case. *See, e.g.*, Illinois Rule of Professional Conduct 1.16(b).

According to the plain meaning of Section 329, Congress had no such artificial and problematic agreements in mind. Section 329 begins, "Any attorney representing a debtor in a case ... shall file with the court a statement of compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of filing of the petition. ..." 11 U.S.C. § 329(a). Thus, Congress explicitly contemplated one attorney in one case with one agreement, including fees paid or agreed to be paid. Section 329 goes on to provide for the cancellation of the agreement or the return of any payment, if "such compensation exceeds the reasonable value of any such services." 11 U.S.C. § 329(b). Again, Congress treated the compensation of the attorney and the reasonable value of services as a whole, not as separate pieces. The Seventh Circuit's interpretation of Section 329 fails to give effect to the words Congress used.

The third use for Section 329 posited by the Seventh Circuit is that if the fees are reaffirmed during the bankruptcy proceeding, the judge again must ensure reasonableness. This use is superfluous: In order to approve a reaffirmation of attorneys fees, the court would be required to find that reaffirmation imposed no undue hardship on the debtor, and that reaffirmation was in the best interest of the debtor. See 11 U.S.C. § 524(c)(3)(B) and 524(c)(6)(A)(ii). Unreasonable fees would never survive the undue hardship and best interest tests.

Fourth, according to the Seventh Circuit, if the debtor repudiates the executory portion of the fee agreement and the estate rehires the same lawyer, once again the judge must review fees for reasonableness. This supposed use of Section 329 does not involve debtors' attorneys fees at all. If the estate rehires the same attorney, then the attorney is no longer the "debtor's" attorney, but the "estate's" attorney, and compensation would be reviewed under Section 330, not Section 329. See *Lamie v. United States Trustee*, 540 U.S ___ (2004) (holding that attorneys for debtors may not be compensated from bankrupt estates, at least in chapter 7 proceedings).

Finally, Judge Easterbrook suggests that "debtors retain the ability to represent themselves." (Pet. App. 5a.) This is true, but it makes no use whatsoever of Section 329. Bankruptcy Judge William Hillman advises debtors "Yes, you do need a lawyer in a bankruptcy case." Hillman, *Personal Bankruptcy: What Every Debtor and Creditor Needs to Know* (2d Ed. 1995), p. 23. Judge Hillman explains:

> The bankruptcy laws can be extraordinarily complicated. Many mistakes people make by trying to do it on their own often cannot be corrected later. Even the simplest choices involve uncertainties and risks if you are not thoroughly familiar with the law.

Id., p. 20. The need for a lawyer is clear: that is what led these Debtors to hire the Law Firms in their bankruptcy cases.

Congress intended Section 329 to enable debtors to hire competent attorneys because debtors need attorneys to obtain the benefits of bankruptcy relief, and because the bankruptcy system needs competent attorneys representing debtors in order to function. Allowing for reasonable compensation is not a species of "social class" preference, it is the method enacted by Congress in Section 329 to promote public policies chosen by Congress. The Seventh Circuit's suggestion that debtors may represent themselves harkens to the words of Marie Antoinette, and suggests similarly self-defeating consequences.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 16, 2004

(Any footnotes trail the end of each document)

No. 03-1303

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ALBERT BETHEA, et al.,
Plaintiffs-Appellants,

v.

ROBERT J. ADAMS & ASSOCIATES; LAW OFFICES OF MELVIN JAMES KAPLAN; and ZALUTSKY & PINSKI, LTD.,
Defendants-Appellees.

September 9, 2003, Argued
December 17, 2003, Decided

COUNSEL: For ROBERT J. ADAMS, & ASSOCIATES, LAW OFFICES OF MELVIN JAMES KAPLAN, ZALUTSKY & PINSKI, Appellees: Timothy M. Kelly, BEERMAN, SWERDLOVE, WOLOSHIN, BAREZKY, BECKER, GENIN & LONDO, Chicago, IL USA.

For ALBERT BETHEA, CORT CHUBKO, NATHANIEL BEARD, JR., Debtors - Appellants: Phillip A. Bock, MACEY, CHERN & DIAB, Chicago, IL USA.

JUDGES: Before CUDAHY, EASTERBROOK, and RIPPLE, Circuit Judges.

OPINIONBY: EASTERBROOK

OPINION: EASTERBROOK, Circuit Judge. Three debtors in bankruptcy hired lawyers before filing their petitions. Each agreed to a retainer that would cover the legal services entailed in preparing and prosecuting the proceedings. Unlike most retainers, however, these were to be paid over time--some installments before the petition was filed, others thereafter. The lawyers performed as promised: all three debtors received their discharges, and the cases were closed. When the lawyers continued to collect the unpaid installments, the three debtors (with the assistance of new counsel) commenced adversary proceedings in which they asked the bankruptcy court to hold their former lawyers in contempt for violating the injunctions implementing the discharges. See 11 U.S.C. § 524.

Bankruptcy Judge Barliant concluded that attorneys' fees"reasonable" under 11 U.S.C. § 329(b) are not discharged.275 B.R. 284 (Bankr. N.D. Ill. 2002). Section 329, which deals directly with attorneys' compensation, supersedes the more general reach of 11 U.S.C. § 727, the discharge provision, the judge held, reasoning that any other conclusion would leave no work for § 329(b) to do. Because statutes should not be read to make any section ineffectual, the bankruptcy court thought that § 329(b) must be the only device for controlling debtors' legal fees. The debtors concede that the fees they had promised to pay their ex-attorneys are reasonable, so Judge Barliant dismissed the adversary proceedings. The district judge affirmed, substantially for the bankruptcy judge's reasons. 287 B.R.906 (N.D. Ill. 2003).

Section 727(b) reads: "Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title." Attorneys' fees are not among the debts excepted from discharge by § 523. The retainer is a pre-petition, liquidated debt; but even if it were an unliquidated "claim" for purposes of § 502,that claim also would be covered. Unless § 329 creates an unenumerated exception to § 727(b), the debts to these attorneys were discharged.

Section 329(a) requires every attorney representing a debtor in bankruptcy to file with the court a statement of all compensation received during the preceding year, or to be received, in connection with the bankruptcy. This statement enables the court to determine whether the lawyer has received a preferential transfer. Debtors may not care who gets what money remains (if the attorney gets more, other creditors get less), and, when clients do not haggle over price, some attorneys will be tempted to divert the funds to themselves by charging excessive fees. Section 329(b) requires bankruptcy judges to use the information supplied under § 329(a) to determine whether "such compensation exceeds the reasonable value of any such services". If it does, then "the court may cancel any such agreement, or order the return of any such payment, to the extent excessive". The bankruptcy and district judges believed that this

power is exclusive of discharge under § 727; otherwise, they stated, § 329(b) would play no role in Chapter 7 cases even though 11 U.S.C. § 103(a) declares that it (like the rest of Chapter 3) applies to Chapter 7 proceedings.

Our difficulty with this approach is that § 329 has plenty to do in Chapter 7 cases, even if debts for legal fees are subject to discharge. First, prepaid fees exceeding the "reasonable" value of the legal services must be recouped for the benefit of other creditors. Second, the judge must ensure the reasonableness of any fees incurred during the proceeding itself, once more to protect other creditors. Third, if the debt is reaffirmed during the proceeding, yet again the judge must ensure reasonableness. Finally, if the debtor repudiates the executory portion of the agreement with counsel, and the estate rehires the same lawyer (an approach that gives administrative priority to ongoing legal fees), once again § 329(b) requires the judge to review the fee agreement for reasonableness. Because grouping legal fees with other debts subject to discharge does not gut § 329(b) for Chapter 7 cases, the structure of the Bankruptcy Code does not support treating § 329 as an implicit exception to § 727. We therefore agree with In re Biggar, 110 F.3d 685 (9th Cir. 1997), that pre-petition debts for legal fees are subject to discharge under § 727. See also In re Sanchez, 241 F.3d 1148, 1150 (9th Cir. 2001). Although Biggar is the only appellate decision squarely in point, almost every bankruptcy judge and district judge who has considered the question has come to the same conclusion--essentially everyone other than the judges in this litigation.

The three lawyers contend that reading § 727 this way would force the most destitute of debtors to forego legal assistance, because counsel neither could be paid in advance (the norm for Chapter 7 cases) nor could collect after the case ends. The bar therefore would shun these debtors, depriving them of the Code's benefits. That argument about what makes for good public policy should be directed to Congress; the judiciary's job is to enforce the law Congress enacted, not write a different one that judges think superior. See Barnhart v. Sigmon Coal Co., 534 U.S. 438, 460-62, 151 L. Ed. 2d 908, 122 S. Ct. 941 (2002). Cf. United States v. Kras, 409 U.S. 434, 34 L. Ed. 2d 626, 93 S. Ct. 631 (1973) (filing fee that makes it possible to be "too poor to go bankrupt" must be implemented). For what it may be worth, however, we do not share the view that taking § 727(b) at face value necessarily injures deserving debtors. Those who cannot prepay in full can tender a smaller retainer for prepetition work and later hire and pay counsel once the proceeding begins--for a lawyer's aid is helpful in prosecuting the case as well as in filing it. Legal fees incurred after filing in such situations receive administrative priority; that prospect(plus some pre-filing retainer) should be enough to summon legal assistance. And debtors retain the ability to represent themselves, when legal aid cannot be found.

Bankruptcy Judge Barliant considered whether an intermediate position is possible, under which the portion of the retainer reflecting work done during the bankruptcy is immune from discharge, even if the portion of the retainer reflecting pre-filing work is discharged. In re Hines, 147 F.3d 1185 (9th Cir. 1998), adopted that position, limiting Biggar to fees for pre-filing work. The Hines majority wrote that it thought

the Code as written (and as implemented in Biggar) is unsatisfactory as a matter of public policy, and it decided to do a little surgery under what it called a "doctrine of necessity." See 147 F.3d at 1190-91. Like Judge Barliant, who concluded that Hines is wrongly decided, we do not conceive revision of the Code as a proper part of the judicial job. The Bankruptcy Code is a complex compromise among debtors and different kinds of creditors; tilting it to help one of these interests is unwarranted. Attorneys compete with other creditors, such as banks, credit card issuers, supermarkets, auto dealers, colleges, spouses, and children; some of these have obtained protection under § 523 and others have not. Judges are not entitled to override the legislative approach with a lawyer-centric public policy that puts members of their own social class higher in the priority list at the expense of other creditors, or of the debtors themselves.

Thus even though the debtors in this appeal have expressed willingness to accept the conclusion of Hines, we must determine whether that is a legally open middle ground. (Even when a litigant confesses error on a district court's conclusion, as these litigants effectively have done with respect to Judge Barliant's treatment of Hines, an appellate court must decide the issue independently. See Lawrence v. Chater, 516 U.S. 163, 170-71, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996); Rinaldi v. United States, 434 U.S 22, 54 L. Ed. 2d 207, 98 S. Ct. 81 (1977). Failure to do so might lead to a remand with instructions to proceed in an unlawful manner.) Deciding whether to follow Hines is essential to the resolution of the appeal. Because both the bankruptcy judge and the district judge concluded that attorneys' fees are never discharged, the sums owed

under the retainer have never been partitioned between pre-and post-filing work. We must either reverse outright (holding that the distinction is not legally material) or remand for apportionment; there is no way to duck.

Hines conceded that it was going against the Code's language. What is discharged is a claim to payment. One contract (the retainer) gives rise to one claim, meaning a"right to payment, whether or not such right is . . . fixed, contingent, matured [or] unmatured". 11 U.S.C. § 101(5).See Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552, 559, 109 L. Ed. 2d 588, 110 S. Ct. 2126 (1990). Hines shattered each retained agreement into multiple claims by holding that a"claim" does not accrue until the legal services are performed. Each month (potentially each day or hour) that the lawyer performs services for the estate then becomes a separate claim. That contradicts both the Code and the retainer agreement, which says that the fee is due whether or not the client uses the services. (That's the difference between a retainer and an hourly fee. Judge Tashima's concurrence in Hines, 147 F.3d at 1192-93, which rejected the majority's legislative approach but accepted the outcome, depends on dividing the retainer into hourly units--a step that avoids rewriting the Code by rewriting the contract instead.)

What is more, even the transformation of one retainer into many claims (using either the approach of the Hines majority or that of Judge Tashima) is not enough to support that decision's holding, which is that fees for postpetition work are not discharged. The most a court could do is give administrative priority to post-petition

fees for work in the action's prosecution. Yet if the debtor's estate is insufficient to pay administrative claims, even those are discharged. Nothing in the Code permits a categorical exception for any kind of debt other than one listed in § 523--and legal fees are not on that list. Because this opinion creates a conflict with the ninth circuit's holding in Hines (though it follows the ninth circuit's original holding in Biggar), it was circulated before release to all active judges. See Circuit Rule 40(e). No judge favored a hearing en banc.

Counsel must repay the debtors any sums collected after the discharges were entered. If any sums were collected on account of the retainers during the bankruptcies in violation of the automatic stay, see 11 U.S.C. § 362, these too must be refunded to the estates. Whether additional steps may be warranted is a question for the bankruptcy and district judges to consider in the first instance, and the cases are remanded for that purpose.

VACATED AND REMANDED.

CONCURBY: CUDAHY (In Part)

DISSENTBY: CUDAHY (In Part)

DISSENT: CUDAHY, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority that the painstaking procedure provided in § 329 of the Bankruptcy Code to conform lawyers' charges to reasonable levels is not in "conflict" with the discharge provisions of §§ 727 and 524 or the automatic stay provision of § 362. The relationship of these sections may be awkward, and this awkwardness raises some questions about Congress's understanding and intent with respect to the discharge of attorneys' fees. It does seem implausible that Congress provided a procedure in § 329 to impose reasonableness on attorneys' fees only to simultaneously decree them discharged under § 727. But, as the majority holds, there is no conflict clear enough to defeat discharge, when attorneys' charges are not among the items specifically excepted from discharge by § 523. This conclusion knocks the props out from the main argument made by the courts below to justify an exception from discharge.

There are, however, other incongruities in the application of the Code that lead one to wonder whether Congress really did anticipate that attorneys' fee claims would be discharged. For example, Bankruptcy Rule 1006, implementing 28 U.S.C. § 1930, provides for payment of bankruptcy filing fees in installments within 120 days after the filing of a bankruptcy petition, but Rule 1006(b)(3) prohibits any payment to the debtor's attorney before the filing fee is

paid in full. See Fed. R. Bankr. P. 1006(b)(3). Rule 1006 codifies the longstanding practice under the former Bankruptcy Act and rules. See, e.g., In re Latham, 271 F. 538 (N.D.N.Y. 1921). Thus, the rules at least implicitly recognize that attorneys representing debtors in connection with their bankruptcies may be paid, and may agree to be paid, post-petition. Although the Bankruptcy Rules may not contradict substantive provisions of the Code, rules propounded by the Supreme Court are presumed not to do so. See In re Moralez, 618 F.2d 76, 78 (9th Cir. 1980) (resolving doubt about prior substantive law in favor of the understanding expressed by the rule); In re Decker, 595 F.2d 185, 189 (3d Cir. 1979) ("strong presumption" in favor of consistency of rules with Code); but see In re Jastrem), 253 F.3d 438, 441-42 (9th Cir. 2001) (resolving inconsistency in favor of Bankruptcy Code and discharging pre-petition fees).

There is also evidence in the history of § 60(d) of the Bankruptcy Act of 1898, as amended (the predecessor of § 329 of the Code), that Congress did not intend that prepetition attorneys' fees be discharged. The Supreme Court characterized § 60(d) as "recognizing the right of . . . a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provisions for reasonable compensation to his counsel." In re Wood, 210 U.S. 246, 253, 52 L. Ed. 1046, 28 S. Ct. 621 (1908); see also In re Falk, 30 F.2d 607, 609 (2d Cir. 1929) ("The object of § 60(d) was to afford the bankrupt representation by counsel, who would not have to take his chances as a general creditor, but might know that a reasonable fee was assured . . . ."). I do not see this, as the majority suggests, as a species of "social-class

preference." It seems to me an arrangement that might enable debtors to obtain counsel in bankruptcy when counsel might be sorely needed. The elementary demands of fairness are offended when a necessitous debtor retains a lawyer to help him unburden himself of his debts and then hoists the unsuspecting attorney on his own petard by not only refusing to pay what is due under the retainer but asking that the lawyer be held in contempt.

Bankruptcy Judge Barliant began his opinion in this case with a plea for an appropriate regard for context in the construction of statutes. In that respect, he quoted from our decision in In re Handy Andy Home Improvement Centers, Inc., 144 F.3d 1125, 1128 (7th Cir. 1998) (Posner, C.J.),"when context is disregarded, silliness results." So in taking account of the context here, there may be some grounds for viewing the discharge of pre-petition attorneys' fees as"silly," but that is a description we must lay at the feet of Congress, which, I think dispositively, failed to include prepetition lawyers' fees as an exception to discharge.

I do not, however, agree with the majority that there is anything in the case before us that requires the rejection of In re Hines, 147 F.3d 1185 (9th Cir. 1998) (Shadur, J.), and thereby the creation of a split with the Ninth Circuit. In this appeal, the debtors claim only that "Defendants violated the automatic stay . . . and the discharge injunction. . . of the Bankruptcy Code by collecting debts from Plaintiffs for attorneys' fees earned pre-petition after Plaintiffs' bankruptcy petitions were filed." Appellants' Br. at 3 (emphasis added). The status of payments for post-petition services is not in issue on this appeal, and the majority

seems to agree that the parties have not raised this issue here. Under ordinary principles of the adversary system, we do not reach out to decide questions not before us. See, e.g., Adam A. Milani & Michael R. Smith, "Playing God: ACritical Look at Sua Sponte Decisions by Appellate Courts,"69 Tenn. L. Rev. 245, 273 (2002) ("Party identification of the issues is at the core of th[e adversary] system and 'the adversary process is no more starkly challenged than when a court decides an issue not raised, for it actually decides something other than what the parties asked it to decide.' ")(footnotes and citations omitted). The fact that, in passing, Judge Barliant disagreed with the Ninth Circuit's analysis in Hines in support of his refusal to jump on the Biggarbandwagon is certainly not a sufficient reason for us to address an issue that is unnecessary to our disposition of this appeal. After all, the bankruptcy judge was rejecting Hines's reaffirmation of Biggar's discharge of pre-petition fees, not its non-discharge of post-petition fees. Moreover, neither party has "confessed error," either explicitly or otherwise, as to Judge Barliant's analysis of Hines, because the outcome has not (until now) hinged on Hines's validity. The majority argues that because it might be appropriate to remand for apportionment, we must instruct the lower courts on how to do that or they may "proceed in an unlawful manner." Slip op. at 5. But we have decided only the disposition of pre-petition fees--the only issue presented on this appeal. What sort of issues may arise on remand and how the parties will frame them is presently unknown, and it is premature to instruct anyone how to deal with an unlitigated issue. The question before us is what issues are raised by the litigants, not, as in Lawrence v. Chater (cited by the majority), whether a lower court would change its

opinion in light of a significant change in circumstances, such as a confession of error by one of the parties to the litigation or a failure to consider an important precedent, if given the opportunity to do so on remand. n1 See Lawrence v. Chater, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).

The issue that the majority seeks to decide prematurely is whether fees for work performed after the filing of the petition are to be discharged, not whether the particular rationales provided by the Hines majority or by Judge Tashima's special concurrence are valid. The underlying principle is that only debts owed at the time of filing the petition are subject to discharge under Section 727. See 11 U.S.C. § 301 (the commencement of a voluntary case under Chapter 7 by filing a petition constitutes an order for relief);11 U.S.C. § 727(b) (operating to discharge "all debts that arose before the date of the order for relief"). As the majority recognizes, fees arising from professional services rendered during bankruptcy are treated entirely differently by the Code. See slip op. at 4. Nonetheless, the majority seems to be saying that because it might be difficult to allocate fees between pre-petition and post-petition work, both must be discharged. These concerns about problems of allocation are, as I have indicated, also premature. Whether the bankruptcy lawyers' fees for post-petition legal services are dischargeable is an issue that may be raised and dealt with on remand in the bankruptcy court, and, as I have pointed out, we have no idea what positions will be taken by the parties with respect to that issue or what rationales they will advance in support of their positions (or whether they will settle the case without further litigation). n2 The validity of

Hines may become an issue at that time, although that is by no means certain, and there will then be a record upon which to evaluate the holding of that opinion. The issue whether all lawyers' fees in the course of a bankruptcy will be discharged, or only the fees incurred prior to filing the petition, is much too important to decide before it is litigated.

Although, as I have argued, the validity of the Ninth Circuit's holding in Hines should not be reached at this time, it should be borne in mind that Hines--incidentally, an opinion authored by an able jurist from the Seventh Circuit, sitting by designation--is not only the law of the Ninth Circuit, see In re Sanchez, 241 F.3d 1148, 1150 (9th Cir. 2001), but has been followed elsewhere, see, e.g., In re McNickle, 274 B.R. 477, 480 n.5 (S.D. Ohio 2002). n3 And the principle that fees applicable to post-petition activities are not discharged, even if based on a pre-petition contract, has been broadly recognized. See, e.g., Siegel v. Federal Home Loan Mortgage Corp., 143 F.3d 525, 532 (9th Cir. 1998); In re Sure-Snap Corp., 983 F.2d 1015, 1018 (11th Cir. 1993); In re Hadden, 57 B.R. 187 (Bankr. W.D. Wis. 1986). But, more immediately relevant, the status of Hines in this circuit is an issue we may not properly reach in this appeal, and I see no merit to doing so. As Judge Easterbrook observed in another bankruptcy case, "we do not create conflicts among the circuits without strong cause. A conflict here would be gratuitous." Mayer v. Spanel Int'l Ltd., 51 F.3d 670, 675 (7th Cir. 1995).

I therefore respectfully dissent to the extent I have indicated.

FOOTNOTES

n1 In fact, the majority is arguing not that a simple vacatur and remand is appropriate in this case as it was in Lawrence v. Chater, but that the parties (despite all indications to the contrary) have actually appealed the validity of Hines with respect to the discharge of post-petition fees, and that we must therefore pass judgment on that issue. Moreover, what the majority characterizes as an "effective" "confess[ion of] error" by the litigants is, if anything, merely argumentation on appeal that the lower court (not the parties themselves) has made an error of law. Lawrence v. Chater is thus inapposite, and neither it nor Rinaldi v. United States, 434 U.S. 22, 54 L. Ed. 2d 207, 98 S. Ct. 81 (1977) (also cited by the majority), requires this court to "decide the issue independently." Slip op. at 5.

n2 It should be kept in mind that the debtors have argued vociferously that "legal fees only become a 'claim' as the legal services are performed," Appellants' Br. at 14, and would be judicially estopped from arguing the opposite on remand if the majority did not insist on prematurely invalidating the holding of Hines. And the bankruptcy lawyers have argued Hines is wrong only in that it discharges pre-petition fees; they have obviously never argued that post-petition fees should also be discharged. See Appellee's Br. at 17-18.

n3 Even though the majority disparages the idea of dividing a retainer agreement into multiple "claims" accruing when legal services are performed, "Illinois law entitles a client to discharge his lawyer (without liability) at any time, with or without cause." Maksym v. Loesch, 937 F.2d 1237, 1245 (7th Cir. 1991), citing

Rhoades v. Norfolk & Western Ry., 78 Ill. 2d 217, 399 N.E.2d 969, 974, 35 Ill. Dec. 680 (Ill. 1979).(For the record, the Illinois Supreme Court followed California's lead in deciding this issue. See Fracasse v. Brent, 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (Cal.1972) (allowing attorney discharged with or without cause to receive a reasonable fee for services rendered). Judge Tashima's rationale for allowing post-petition fees therefore does not actually involve "rewriting the contract" at all, because, just as in Illinois, California law does not create a right to payment until services have been performed.) Thus, particularly in this case, there is no support for the majority's argument that bifurcating an agreement for legal fees in the way advocated in Hines "contradicts both the Code and the retainer agreement, which says that the fee is due whether or not the client uses the services." Slip op. at 6.For this reason, it is also arguable whether installment fee agreements entered into by Illinois bankruptcy lawyers would actually give rise to any "right to payment" until they have performed the agreed-upon legal services.

Rather, both Illinois law governing lawyer-client fee agreements and the Code support Hines's holding that post-petition fees are not discharged. Under Illinois law, a bankruptcy lawyer is entitled to the value of services rendered under a theory of quantum meruit. This is entirely in keeping with § 329(b) of the Code, which requires bankruptcy courts to make exactly that determination. Although the majority's holding today is arguably correct in finding that the Bankruptcy Code trumps the law of restitution in denying a reasonable fee for pre-petition services rendered by"lawyers . . . in circumstances in which they can reasonably be

expected to be compensated," Gaskill v. Gordon, 160 F.3d 361, 363 (7th Cir. 1998), neither the Code nor Illinois contract law supports the majority's gratuitous determination that these lawyers are not entitled to their post-petition fees.

No. 02 C 3557

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

ALBERT BETHEA, et al.,
Plaintiffs-Appellants,

v.

ROBERT J. ADAMS & ASSOCIATES, et al.,
Defendants-Appellees.

January 2, 2003, Decided
January 3, 2003, Docketed

COUNSEL: For ALBERT BETHEA, CORT CHUBKO, NATHANIEL BEARD, JR, appellants: Robert M. Hatch, Thomas George Macey, Malik R. Diab, Phillip A. Bock, Macey Chern & Diab, Chicago, IL.

For ROBERT J. ADAMS & ASSOCIATES, LAW OFFICES OF MELVIN JAMES KAPLAN, ZALUTSKY & PINSKI, LTD., appellees: Alvin R. Becker, Timothy Michael Kelly, Beermann, Swerdlove, Woloshin, Barezky, etal, Chicago, IL.

For ROBERT J. ADAMS & ASSOCIATES, LAW OFFICES OF MELVIN JAMES KAPLAN, ZALUTSKY & PINSKI, LTD., appellees: Cathleen M. Combs, Daniel A. Edelman, James O. Latturner, Tara Leigh Goodwin, Edelman, Combs & Latturner, Chicago, IL.

JUDGES: James B. Zagel, United States District Judge.

OPINIONBY: James B. Zagel

OPINION:

The appellants ("Debtors") in this bankruptcy appeal were debtors in cases arising under chapter 7 of the Bankruptcy Code. Each of the Debtors retained one of the defendant law firms ("Law Firms") to prepare and file a bankruptcy petition, and those petitions were filed. Before the petition filings, though, the Debtors signed standard form retainer agreements requiring them to pay the Law Firms' initial fees in monthly installments. The Debtors do not allege that those fees were unreasonable or that the Law Firms did not earn them. In accordance with the terms of these agreements, the Law Firms deducted monthly payments from the Debtors' bank accounts for the legal services they performed preceding the orders for relief. The Law Firms deducted installments while the chapter 7 bankruptcy cases were pending and after the Debtors received their discharges. Debtors subsequently sued the Law Firms accusing them of violating the automatic stay and discharge injunction of the Bankruptcy Code and of professional negligence. The allegedly unlawful conduct consists of collecting agreed fees after the bankruptcy cases were filed. The Law Firms moved to dismiss Debtors' complaint for failing to state a claim on which relief can be granted. The United States Bankruptcy Court for the Northern District of Illinois granted the motion, concluding that Congress intended the fee agreements at issue to be regulated by § 329 of the Code, not voided by the

automatic stay and discharge provisions. In re Bethea, 275 B.R. 284, 295 (Bankr. N.D. Ill. 2002). Debtors now appeal this decision to this court, which has jurisdiction pursuant to 28 U.S.C. § 158(a). Because the Bankruptcy Court's order is based on a question of law, I must review the issue de novo. In re Smith, 286 F.3d 461, 464-65 (7th Cir. 2002).

The issue in this case concerns claims arising from a pre-petition retainer agreement between a chapter 7 debtor and his bankruptcy counsel. The Debtors would have such claims treated just like any other pre-petition claim under the automatic stay created under § 362 and the discharge injunction created by § § 727 and 524 of the Bankruptcy Code. n1 The Debtors' analysis is supported by the vast majority of courts having considered the question. See In re Biggar, 110 F.3d 685 (9th Cir. 1997); In re Nieves, 246 B.R. 866 (Bankr. E.D. Wis. 2000); In re Toms, 229 B.R. 646 (Bankr. E.D. Pa. 1999); In re Jastrem, 224 B.R. 125 (Bankr. E.D. Cal. 1998); In re Voglio, 191 B.R. 420 (Bankr. D. Ariz. 1996); In re Symes, 174 B.R. 114 (Bankr. D. Ariz. 1994). The Law Firms argue that the automatic stay and discharge provisions of the Code cannot be read in isolation from § 329, which governs the fees of "any attorney representing a debtor in a case under [the Bankruptcy Code], or in connection with such a case." 11 U.S.C. § 329(a). As such, they argue that claims for pre-petition legal fees are not subject to automatic stay and discharge. The Law Firms' analysis is supported by only one opinion that is still viable. See In re Perry, 225 B.R. 497 (Bankr. D. Colo. 1998); see also In re Mills, 170 B.R. 404 (Bankr. D. Ariz. 1994) (implicitly overruled by Biggar). Although the Debtors win the numbers game in terms of supporting precedent, I find

the Law Firms' position and the Bankruptcy Court's ruling ultimately more persuasive even though they stand alone against "a sea of uniform and contrary precedent." n2

Statutory construction must begin with the language of the statute itself, and often ends there. See Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 557-58, 109 L. Ed. 2d 588, 110 S. Ct. 2126 (1990). But it sometimes cannot end there, particularly where more than one provision of a statute may fairly be said to be applicable. When this is so, a federal court "must not be guided by a single sentence or member of a sentence [but must] look to the provisions of the whole law . . . and to its object and policy." Kelly v. Robinson, 479 U.S. 36, 43, 93 L. Ed. 2d 216, 107 S. Ct. 353 (1986). In other words, due regard must be given to the context of the statute. In re Handy Andy Home Improvement Centers, 144 F.3d 1125, 1128 (7th Cir. 1998) ("When context is disregarded, silliness results."). Thus, the Supreme Court has been reluctant to interpret one section of the Bankruptcy Code so that another one is surplusage or insignificant, Davenport, 495 U.S. at 562, and it has directed that a statute "cannot be held to destroy itself," Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 20, 133 L. Ed. 2d 258, 116 S. Ct. 286 (1995).

Significantly for present purposes, "where two statutes deal with the same subject matter, they are to be read in pari materia and harmonized when possible." In re Johnson, 787 F.2d 1179, 1181 (7th Cir. 1986). Equally significantly, "[a] general statutory rule usually does not govern unless there is no more specific rule." Green v. Bock Laundry Machine Co., 490 U.S. 504, 524, 104 L.

Ed. 2d 557, 109 S. Ct. 1981 (1989). Thus, where there is a particular remedial scheme addressing a particular subject matter, that regulatory structure may not be circumvented by resort to laws of more general applicability. Boulahanis v. Board of Regents, 198 F.3d 633, 641 (7th Cir. 1999). Once an entire statute has been properly considered, if "congressional intent is clear, [the court's] sole function is to enforce the statute according to its terms." Davenport, 495 U.S. at 564.

This appeal concerns the relationship between bankruptcy debtors and their attorneys. Congress wrote a series of sections into the Code to regulate the relationship between debtors and professionals. See 11 U.S.C. § § 327-331. One of those sections, § 329, deals specifically with the relationship between attorneys and clients in chapter 7 cases. n3 Pursuant to § 329(a), attorneys representing debtors must disclose the amount, source and terms of all "compensation paid or agreed to be paid . . . for services rendered or to be rendered in contemplation of or in connection with the case." Id. Section 329(b) requires a bankruptcy court to scrutinize that agreement, whether or not the attorney applies for compensation under § 330(a). If the agreed fees exceed the reasonable value of the legal services provided, this section authorizes two remedies: the court may order the return of any payments that have already been made or it may cancel the agreement to the extent excessive. Congress therefore explicitly contemplated that there will be some instances in which the debtor will have already paid all the fees related to the case before the case is commenced, and there will be other instances in which the debtor will have not paid all the fees but will have agreed to pay some part after the case is commenced.

It is clear to me that the fees of attorneys representing debtors in bankruptcy are governed by § 329, not by the more general automatic stay and discharge provisions. I reach this conclusion partly because I find that there is a conflict between § 329 and the automatic stay and discharge provisions. If pre-petition attorneys fees were subject to automatic stay and discharge, then § 329 would serve no purpose in chapter 7 cases as applied to "compensation . . . agreed to be paid." The remedy for excessive fees to be paid in the future would be unnecessary if collection of those fees is subject to automatic stay and the obligation is then permanently extinguished by the discharge provision. The Perry Court agreed:

Congress, by enacting Section 329 . . . clearly contemplated the existence of fees "agreed to be paid . . . for services rendered or to be rendered" in contemplation of and in connection with a bankruptcy case. Congress legislated a method of disclosure of attorneys fees and provided a method to regulate such fees in order to protect vulnerable debtors. It is not consistent with the enactment of Section 329 to assume that Congress intended to eradicate the existence of fees "agreed to be paid . . . for services rendered or to be rendered" by granting a discharge to such fees.

225 B.R. at 500. The Court concluded that a reasonable fee for legal services, properly disclosed, was not subject to discharge. Furthermore, in place of the legal standard of "reasonable value" set forth in § 329, the automatic stay and discharge provisions substitute a legal standard of negation with respect to post-petition payments for pre-petition services. n4 Therefore, the Debtors' position would essentially negate substantive

provisions of § 329. Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 461, 151 L. Ed. 2d 908, 122 S. Ct. 941 (2002) recognizes that applying a statute's plain language, as advocated by the Debtors, cannot be done if there exists "conflicting provisions" in a statute, such as the situation here.

The history of § 329 also supports the determination that it, rather than the automatic stay and discharge provisions, covers the fees of attorneys representing debtors in bankruptcy. Congress derived § 329 from a provision that was different from other sections generally applying to creditors, former Bankruptcy Rule 2002, which in turn had been derived from § 60(d) of the 1898 Bankruptcy Act. See 3 Collier on Bankruptcy P 329.LH[1]-[4], at 329-30 to -31 (Lawrence P. King ed., 15th ed. 1996); H.R. Rep. No. 595, 95th Cong., 1st Sess. 329 (1977); S Rep. No. 989, 95th Cong., 2d Sess. 39 (1978). Section 60(d) was designed as much to protect debtor's right to counsel as it was to control the compensation of counsel. See In re Wood v. Henderson, 210 U.S. 246, 253, 52 L. Ed. 1046, 28 S. Ct. 621 (1908); In re Cummins, 196 F. 224, 225-26 (S.D.N.Y. 1912); In re Falk, 30 F.2d 607, 609 (2d Cir. 1929); Caldwell v. Valley Nat'l Bank of Phoenix, 208 F.2d 645, 646 (10th Cir. 1953). For example, the Second Circuit noted that the "object" of the provision "was to afford the bankrupt representation by counsel, who would not have to take chances as a general creditor, by might know that a reasonable fee was assured, and hence would be zealous to render active service in what is often a difficult situation." In re Falk, 30 F.2d at 609. Thus, courts recognized that employment contracts with debtors' attorneys did not fit comfortably within the scheme designed to regulate payments to general

creditors, because the agreement between a debtor and his counsel is fundamental to the success of the bankruptcy case itself and is thus qualitatively different.

The normal rule of statutory construction, that if Congress intends for legislation to change a judicial interpretation, it clearly expresses that intention, is followed with particular care in construing bankruptcy codifications. Midatlantic Nat'l Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494, 501, 88 L. Ed. 2d 859, 106 S. Ct. 755 (1986). The Supreme Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." Davenport, 495 U.S. at 563. "When Congress amends the bankruptcy laws, it does not write 'on a clean slate.'" Dewsnup v. Timm, 502 U.S. 410, 419, 116 L. Ed. 2d 903, 112 S. Ct. 773 (1992). Because Congress said nothing indicating that it intended to change prior law with its enactment of § 329(b), § 329 ought to be considered a discrete, exclusive regulation of fee agreements. There is nothing in the Bankruptcy Code or its legislative history indicating that Congress intended to narrow the right of debtors to the advice and assistance of counsel in any way or to diminish the ability of debtors to make provision for reasonable attorneys fees, as Debtors' theory proposes. To the contrary, § 329 recognizes the right of debtors to the assistance of counsel, and protects that right by enabling debtors to make provision for the reasonable compensation of counsel.

Finally, common sense and important public policy concerns weigh against the Debtors' theory of automatic stay and discharge. Nobody could seriously

argue that Congress intended to make it impossible for chapter 7 debtors, but not debtors under other relief chapters, to enter into agreements with the bankruptcy attorneys providing for payment after the commencement of the case. Such a result would not further the statutory goal of relieving honest but financially distressed individuals from debt incurred in the past; rather it would make it more difficult for many debtors to get a fresh start that is the promise of chapter 7.

Reading all relevant provisions of the Code in their context as part of a coherent whole, with a view towards the Code's history and fulfilling the overriding purposes of its statutory scheme, leads to the reasonable conclusion that Congress intended that attorney fee agreements be regulated under § 329 and necessarily excluded from the reach of the automatic stay and discharge. As such, Debtors' complaint failed to allege any violation of § § 362 or 524, and because no such violation was alleged, there was no basis for a claim of professional negligence under Illinois law. Judge Barliant did a good job in his opinion and offered an analysis which, despite some initial doubts based upon the majority decisions, I find persuasive and have followed in this opinion.

The Bankruptcy Court's decision granting the Law Firms' motion to dismiss all counts of the Debtors' complaint for failure to state claims upon which relief can be granted is AFFIRMED.

ENTER:

James B. Zagel
United States District Judge

DATE: 2 Jan 2003

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the order of the bankruptcy court granting dismissal is affirmed.

Date: January 2, 2003

FOOTNOTES

n1 Section 362 prohibits the collection of debtors upon filing of a debtor's bankruptcy petition, and § 524 creates a permanent injunction against collection upon entry of a debtor's discharge order.

n2 Pursuant to the Debtors' request, I have given "most respectful consideration" to prior decisions on this matter, see Colby v. J.C. Penney Co., Inc., 811 F.2d 1119, 1123 (7th Cir. 1987), but respect does not entail blind adherence solely for the sake of consistency as the Debtors seem to imply.

n3 "(a) Any attorney representing a debtor in a case under this title, or in connection with such a case,

whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation. (b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to (1) the estate, if the property transferred (A) would have been property of the estate; or (B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or (2) the entity that made such payment."

n4 The "reasonable value" standard is substantive. See Matter of Liberal Market, Inc., 24 B.R. 653 (Bankr. S.D. Ohio 1982).

Chapter 7, Case No. 99 B 13557, Adversary Proceeding No. 01 A 00187, Chapter 7, Case No. 99 B 34885, Adversary Proceeding No. 01 A 00196, Chapter 7, Case No. 98 B 006516, Adversary Proceeding No. 01 A 00197

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In re Albert Bethea,
Debtor.

Albert Bethea, on behalf of himself and all others similarly situated,
Plaintiff,

v.

Robert J. Adams & Associates,
Defendant.

In re Cort Chubko,
Debtor.

Cort Chubko, on behalf of himself and all others similarly situated,
Plaintiff,

Law Offices of Melvin James Kaplan,
Defendant.

In re Nathaniel Beard, Jr.,
Debtor.

Nathaniel Beard, Jr., on behalf of himself and all others similarly situated,
Plaintiff,

Zalutsky & Pinski, Ltd.,
Defendant.

March 29, 2002, Decided
March 29, 2002, Filed

COUNSEL: For Debtor: ROBERT J ADAMS, ROBERT J ADAMS & ASSOCIATES, CHICAGO, IL.

For Trustee: ALLAN J DEMARS, SPIEGEL & DEMARS, CHICAGO, IL.

JUDGES: Hon. Ronald Barliant, United States Bankruptcy Judge.

OPINIONBY: Ronald Barliant

OPINION:

MEMORANDUM OPINION

The Seventh Circuit Court of Appeals has instructed that the proper construction of statutes requires regard for context. "When context is disregarded, silliness results." In re Handy Andy Improvement Centers, 144 F.3d 1125, 1128 (7th Cir. 1998). If ever a case proved the point, this one is it.

The plaintiffs (the "Debtors") in these three adversary proceedings were debtors in cases under chapter 7 of the Bankruptcy Code. They are suing the law firms

that represented them in these chapter 7 cases. On behalf of themselves and all similarly situated chapter 7 debtors, they accuse their erstwhile attorneys of violations of the automatic stay and the discharge injunction and of professional negligence. The lawyers' allegedly unlawful conduct consisted of collecting agreed fees after the bankruptcy cases were filed. The defendants (the "Law Firms") have moved to dismiss the Second Amended Class Action Complaint for failing to state a claim on which the law will grant relief.

I. Factual Background Presented in Complaint

Each of the Debtors retained his respective Law Firm to prepare and file a bankruptcy petition under chapter 7 of the U.S. Bankruptcy Code, and those petitions were filed. Before the petition filings, though, the Debtors signed standard form retainer agreements requiring them to pay the Law Firms' initial fees of $ 1625, $ 1200, and $ 900 in monthly installments. The Debtors do not allege that those fees were unreasonable or that the defendant Law Firms did not earn them. In accordance with the terms of these agreements, the Law Firms deducted monthly payments from the Debtors' bank accounts for the legal services they performed preceding the orders for relief. The Law Firms deducted installments while the chapter 7 bankruptcy cases were pending and after the Debtors received their discharges.

II. Jurisdiction

The U.S. District Court for the Northern District of Illinois has jurisdiction to render a final judgment according to 28 U.S.C. § 1334(b) in matters arising

under sections 362(a), 524(a)(2), and 727(b) of the U.S. Bankruptcy Code. This matter is before this Bankruptcy Court pursuant to 28 U.S.C. § 157(a) and Internal Operating Procedure 15(a) of the U.S. District Court for the Northern District of Illinois, which automatically refers bankruptcy cases and proceedings to this Court for determination. A proceeding to prosecute a violation of the discharge injunction or the automatic stay is a core proceeding. See In re Barbour, 77 B.R. 530, 532 (Bankr. E.D.N.C. 1987); In re Elegant Concepts, Ltd., 67 B.R. 914, 917 (Bankr. E.D.N.Y. 1986). Whenever core matters predominate over a non-core count, such as the state-law professional negligence cause of action, the Court may determine that the entire proceeding is a core proceeding. See Blackman v. Seton (In re Blackman), 55 B.R. 437, 443 (Bankr. D.D.C. 1985). These proceedings are therefore within the core jurisdiction of this Court, which will enter a final judgment.

III. Discussion and Analysis

The issue in this case concerns claims arising from a prepetition retainer agreement between a chapter 7 debtor and his bankruptcy counsel. The plaintiffs would have such claims treated just like any other prepetition claim under the Bankruptcy Code. The Debtors' analysis is supported by the majority of courts having considered the question. See Hessinger & Associates v. U.S. Trustee (In re Biggar), 110 F.3d 685 (9th Cir. 1997); In re Nieves, 246 B.R. 866 (Bankr. E.D. Wis. 2000); In re Toms, 229 B.R. 646 (Bankr. E.D. Pa. 1999); In re Jastrem, 224 B.R. 125 (Bankr. E.D. Cal. 1998); In re Voglio, 191 B.R. 420 (Bankr. D. Ariz. 1996); In re Symes, 174 B.R. 114 (Bankr. D. Ariz. 1994). Only one

opinion that is still viable law takes a contrary position. See In re Perry, 225 B.R. 497 (Bankr. D. Colo. 1998); see also In re Mills, 170 B.R. 404 (Bankr. D. Ariz. 1994) (implicitly overruled by Biggar).

The minority-view cases express the concern that subjecting chapter 7 debtors' attorneys to the restrictions applicable to other claims will deprive the most indigent of the opportunity to obtain legal representation, because they will not be able to pay their entire legal bills before their petitions are filed. See id. at 410. However valid that policy concern may be, the majority-view courts are correct that policy is Congress's territory; courts ought not create exceptions to the automatic stay and the discharge injunction that Congress has not put there. See In re Biggar, 110 F.3d at 688; In re Nieves, 246 B.R. at 872-73; In re Jastrem, 224 B.R. at 129; In re Symes, 174 B.R. at 117; Joshua D. Morse, Comment, Public Policy Is Never a Substitute for Statutory Clarity: Rejecting the Notion That Pre-Petition Attorney-Fee Debts Are Nondischargeable in Chapter 7 Bankruptcies, 40 Santa Clara L. Rev. 575, 606 (2000). These authorities focus narrowly on the language of the automatic stay and discharge sections of the Bankruptcy Code, which they find both clear and applicable. See Biggar, 110 F.3d at 688; Symes, 174 B.R. at 117, 119.

Section 362(a)(6) stays "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case." Section 727(b) "discharges the debtor from all debts that arose before the date of the order for relief . . . whether or not a proof of claim based on any such debt or liability is filed under section 501 . . . and whether or not a claim based on any such

debt or liability is allowed under section 502." Once a bankruptcy court grants the discharge, § 524(a)(2) "operates as an injunction against the commencement or continuation of an act[] to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." Nothing in the exceptions to discharge listed in § 523(a) excludes from discharge a prepetition debt for attorneys' fees incurred in the prosecution of the bankruptcy case.

This Court, however, rejects the majority view. That rejection is not grounded on this Court's policy preferences; rather, it is based on Congress's policy preferences. By slavishly applying the terms of a few sections of the Code, the majority-view courts have misapplied the plain-meaning rule and directly violated the rules of statutory construction that higher courts mandate this Court to follow. Put simply, the majority-view courts have misread the statute.

As the Debtors rightly urge, statutory construction must begin with the language of the statute itself. See Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552, 557-58, 109 L. Ed. 2d 588, 110 S. Ct. 2126 (1990) (main holding superceded by statute). Even when the provision at issue conflicts with no other provision in the Bankruptcy Code, however, the Supreme Court has recognized that the text is merely the starting point and that a federal court "must not be guided by a single sentence or member of a sentence [but must] look to the provisions of the whole law[] and to its object and policy." n1 Kelly v. Robinson, 479 U.S. 36, 43, 93 L. Ed. 2d 216, 107 S. Ct. 353 (1986). Thus, the Court has been reluctant to interpret one section of the

Code so that another one is surplusage or insignificant, Davenport, 495 U.S. at 562, and it has directed that a statute "cannot be held to destroy itself." Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 20, 133 L. Ed. 2d 258, 116 S. Ct. 286 (1995).

Significantly for present purposes, "where two statutes deal with the same subject matter, they are to be read in pari materia and harmonized when possible." In re Johnson, 787 F.2d 1179, 1181 (7th Cir. 1986). Equally significantly, "a specific statute takes precedence over a more general statute." Id. (citing Busic v. United States, 446 U.S. 398, 406, 64 L. Ed. 2d 381, 100 S. Ct. 1747 (1980) (main holding superceded by statute). Once an entire statute has been properly considered, if "congressional intent is clear, [the court's] sole function is to enforce the statute according to its terms." Davenport, 495 U.S. at 564; see Dewsnup v. Timm, 502 U.S. 410, 419-20, 116 L. Ed. 2d 903, 112 S. Ct. 773 (1992). The fallacy in the Debtors' position is that congressional intent must never be found by reading the language, however plain, of sections of a statute in isolation from either the rest of the statute or the purposes the statute was enacted to fulfill. A court must discern congressional intent by looking "to the provisions of the whole law[] and to its object and policy." Kelly v. Robinson, 479 U.S. 36, 43, 93 L. Ed. 2d 216, 107 S. Ct. 353 (1986). In this circuit, courts that myopically read statutory provisions without regard to context are violating the principles spelled out in In re Handy Andy Home Improvement Centers, 144 F.3d 1125, 1128 (7th Cir. 1998):

Statutory language like other language should be read in context. Textron Lycoming Reciprocating Engine

Division v. United Automobile, Aerospace & Agricultural Implement Workers, 523 U.S. 653, 118 S. Ct. 1626, 1629, 140 L. Ed. 2d 863, (1998); Sundstrand Corp. v. Commissioner, 17 F.3d 965, 967 (7th Cir. 1994); Bell Atlantic Tel. Cos. v. FCC, 327 U.S. App. D.C. 390, 131 F.3d 1044, 1047 (D.C. Cir. 1997). The context consists not merely of other sentences but also of the real-world situation to which the language pertains. . . . When context is disregarded, silliness results.

These proceedings concern the relationship between bankruptcy debtors and their attorneys. Congress wrote a series of sections into the Bankruptcy Code, § § 327-331, to specifically regulate the relationship between debtors (and trustees and chapter 11 statutory committees) and attorneys (and other professionals). One of those sections deals specifically with the relationship between attorneys and clients in chapter 7 cases, § 329. n2 The code sections on which the plaintiffs rely are in tension with that section. Section 329(a) (emphasis added) requires a debtor's attorney to file "a statement of the compensation . . . agreed to be paid," and § 329(b) requires a bankruptcy court to scrutinize that agreement, whether or not the attorney applies for compensation under § 330(a). If the agreed fees exceed the reasonable value of the legal services provided, this section authorizes two remedies: the court may order the return of any payments that have already been made, or it may cancel the agreement to the extent excessive.

Congress therefore explicitly contemplated that there will be some instances in which the debtor will have already paid all the fees related to the case before the case is commenced, and there will be other instances in

which the debtor will not have paid all the fees but will have agreed to pay some part after the case is commenced. The plaintiffs' theory, however, would render those provisions as applied to chapter 7 debtors largely nugatory. The remedy for excessive fees to be paid in the future would be unnecessary if collection of those fees is subject to the automatic stay and the obligation is then permanently extinguished by the discharge. Similarly, Federal Rule of Bankruptcy Procedure 2017(b) would be nullified in chapter 7 cases by a literal reading of sections 362(a), 524(a)(2), and 727(b), because it permits a court to determine whether an agreement for "any payment of money . . . by the debtor to an attorney after entry of an order for relief . . . is excessive . . . if the payment, transfer, or agreement therefor is for services in any way related to the case." Such a review would be a waste of time if the payment due could not be legally collected after the order for relief and the discharge. Further, canceling the unreasonable portion of a fee contract under § 329 would not serve to protect the estate from an excessive claim because § 502(b)(4) already authorizes disallowance of a claim for attorneys fees to the extent the amount is unreasonable. n3 Therefore, under the Debtors' theory, § 329(b) would serve no purpose in chapter 7 cases as applied to "compensation . . . agreed to be paid."

The majority-view courts have attempted to address the tension between §§ 362(a), 524(a)(2), and 727(b), on the one hand, and § 329, on the other, by searching for situations in which § 329 might not be rendered superfluous and the statutory scheme might not be rendered incoherent and inconsistent. Those courts and the Debtors suggest that § 329 continues to apply to all

cases under chapters 11, 12, and 13; in chapter 7 cases, it also continues to apply to postpetition reaffirmation agreements between debtors and their bankruptcy attorneys. See In re Nieves, 246 B.R. 866, 872-73 (Bankr. E.D. Wis. 2000); In re Symes, 174 B.R. 114, 118 (Bankr. D. Ariz. 1994). Consequently, the majority-view courts conclude that § 329 can harmoniously coexist with a literal application of the other four provisions. See id. Unfortunately, the majority position ignores § § 103(a) and 524(c).

First, § 103(a) mandates that "chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title." When Congress intended that a provision in chapter 3 not be applied in either chapter 7, 11, 12, or 13, Congress simply said so. n4 Yet nothing in § 329 excludes its application to fee agreements in chapter 7 cases. Therefore, § 329 in its entirety ought to be applicable in chapter 7 cases; otherwise, § 103(a) itself would not be given full effect.

Second, reaffirmation agreements with chapter 7 debtors' attorneys pursuant to § 524(c) do not, as the majority position contends, create instances in which § 329(b) has any meaningful use in chapter 7 cases. Under § 524(c)(3)(B), the agreement may not "impose an undue hardship on the debtor or a dependent of the debtor." Additionally, § 524(c)(6)(A)(ii) prescribes that a court may only approve such an agreement if it is in the "best interest of the debtor," at least if the debtor is "an individual who was not represented by an attorney during the course of negotiating [a reaffirmation] agreement." Due to the obvious conflict of interest, the chapter 7 debtor's attorney will not be able to represent the debtor during the negotiation, see Gordon v. Hines

(In re Hines), 147 F.3d 1185, 1190 (9th Cir. 1998); In re Perry, 225 B.R. 497, 500 (Bankr. D. Colo. 1998); Model Rules of Prof'l Conduct R. 1.7(b), 1.8(a)-(c) (2001), and as a practical matter a debtor who cannot pay his first attorney immediately will almost never be able to hire a second to represent him during such negotiations. n5 Therefore, the chapter 7 debtor will be unrepresented in virtually every situation, and the agreement will necessarily be required to meet the "best interest of the debtor" standard. If an agreement is valid because it does not impose an undue hardship on a debtor and is in his best interest, it will never require the debtor to pay for more than the reasonable value of the legal services to which he is entitled under the prepetition contract. Satisfaction of these two standards contained in § 524(c) itself, then, would make it unnecessary to apply § 329(b) to reaffirmation in chapter 7 cases.

The Ninth Circuit's attempt to resolve the tension between § 329(b) and sections 362(a), 524(a)(2), and 727(b) in Gordon v. Hines (In re Hines), 147 F.3d 1185 (9th Cir. 1998), creates another inconsistency. Hines held that a chapter 7 debtor's liability on a prepetition contract with bankruptcy counsel is bifurcated into liability for prepetition services and liability for postpetition services; the attorney's prepetition services create a prepetition claim subject to the automatic stay and the discharge injunction, see id. at 1188, while his postpetition services rendered pursuant to the prepetition agreement create quasi-contractual liability not subject to either of these restrictions, see id. at 1191.

Hines represents a noble effort to avoid the absurd result that otherwise would have followed from

treating bankruptcy counsel's retainer agreement like any other prepetition agreement. Unfortunately, the effort fails because a single contract gives rise to one claim, not two. "Claim" is defined in § 101(5) as "right to payment, whether or not such right is . . . fixed, contingent, matured [or] unmatured. . . ." The Supreme Court, following the plain-meaning rule of statutory construction, has told us that "the plain meaning of a 'right to payment' is nothing more nor less than an enforceable obligation." Davenport, 495 U.S. at 559. "In accordance with this principle, contract-based claims arise at the time the contract is entered into, rather than upon the occurrence of subsequent events such as termination." In re Caldor, Inc., 240 B.R. 180, 192 (Bankr. S.D.N.Y. 1999). "The fact [that a] creditor may hold a contingent right to payment n6 until filing the petition does not mean counsel holds a post-petition claim." In re Symes, 174 B.R. 114, 118 (Bankr. D. Ariz. 1994) (a majority-position case). Consistent with the general rule, the Seventh Circuit has held that a creditor who performed services after the petition was filed held a prepetition claim, rather than a post petition administrative expense claim, because "the agreement among the parties was entered into . . . before the petition was filed." In re Jartran, Inc., 732 F.2d 584, 587 (7th Cir. 1984); see also Pension Benefit Guaranty Corp. v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.), 126 F.3d 811, 818-19 (6th Cir. 1997). The enforceable obligation to pay the Law Firms' fees arose when the Debtors signed the agreements, not later.

In re Jastrem, 224 B.R. 125, 129 (Bankr. E.D. Cal. 1998). Hines, in effect, carves out a special category for retainer agreements in order to get them away from

the operation of the "plain meaning" of the automatic stay and discharge sections of the Code, but in so doing, the court plays havoc with the plain meaning of § 101(5).

Hines was correct in one respect: it was right to treat fee agreements with bankruptcy counsel differently than other agreements. Hines' defect is in its reason for doing so. The real reason that courts must treat such fee agreements as a special category is because Congress has mandated us to do so. That mandate is in § 329. Courts cannot apply that section according to its terms if the very agreements it regulates are already disposed of by the automatic stay and discharge provisions. Therefore, fulfilling congressional intent requires judicial recognition that Congress intended that agreements within the scope of § 329 be outside the scope of § § 362, 524, and 727.

The Debtors, however, insist that the plain-meaning rule in United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989), requires the result they seek. In fact, their argument is not an application of the plain-meaning rule; their argument is a parody of the plain-meaning rule. The plain-meaning rule declared by the Supreme Court in Ron Pair only states that when the language of the Code is sufficiently precise to discern congressional intent, a court's sole function is to enforce it according to its terms without reference to legislative history or pre-Code practice. See id. at 241, 245-46; see also Pittway Corp. v. United States, 102 F.3d 932, 934-35 (7th Cir. 1996). Ron Pair, however, did not sanction construing the words - even the plain words - of one section of a statute in a way that makes another section

surplusage, destroys the coherence of the statutory scheme, or leads to results that common sense tells us Congress never intended. To the contrary, Ron Pair itself declared:

> The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 73 L. Ed. 2d 973, 102 S. Ct. 3245 (1982). In such cases, the intention of the drafters, rather than the strict language, controls. Id. It is clear that allowing postpetition interest on nonconsensual oversecured liens does not contravene the intent of the framers of the Code. Allowing such interest does not conflict with any other section of the Code, or with any important state or federal interest . . . . Respondent has not articulated, nor can we discern, any significant reason why Congress would have intended, or any policy reason would compel, that the two types of secured claims be treated differently in allowing post-petition interest.
>
> Ron Pair, 489 U.S. at 242-43.

In this case, in contrast, literal application of the automatic stay and discharge provisions will contravene the intent of the framers because it will conflict with another section of the Code, § 329, and with important federal interests, including the interest in equal access to the courts and the efficient operation of the bankruptcy system. And it is self-evident why Congress would have intended that installment-fee agreements with bankruptcy counsel not be subject to

the automatic stay or the discharge provisions. Chapter 7 is intended to afford relief to financially distressed debtors. A debt incurred to the debtor's bankruptcy counsel does not add to the debtor's distress; rather, it is the means by which the debtor may obtain relief from that distress. The automatic stay and discharge are intended to benefit debtors; the plaintiffs' construction impairs the debtors' ability to get those very benefits. And nobody, including the Debtors, could seriously contend that the drafters of the 1978 Code intended to discriminate against the most impecunious would-be debtors and to create an instant conflict of interest between them and their attorneys. In short, the plain meaning rule does not require naive literalism; rather, that rule prohibits such literalism because it requires a consideration of context and purpose. Proper application of the rule here requires dismissal of the complaint.

Higher courts have not hesitated to harmonize seemingly conflicting Code provisions by restricting the reach of language that otherwise was plain. In Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 20-21, 133 L. Ed. 2d 258, 116 S. Ct. 286 (1995), the Supreme Court narrowed the scope of § 362(a)(7) in order to preserve the right of a creditor to offset a mutual debt in § 553(a). In In re Duke, 79 F.3d 43, 45 (7th Cir. 1996), the Seventh Circuit limited the reach of § 362(a)(6)'s literal terms in order to meaningfully preserve the right of a prepetition creditor to communicate a reaffirmation offer to a debtor under § 524(c). In Zerand-Bernal Group, Inc., v. Cox, 23 F.3d 159, 161 (7th Cir. 1994), the court refused to apply 28 U.S.C. § 1334 according to its "full breadth" because doing so would extend bankruptcy jurisdiction beyond the intent and purpose

of that section. Similarly, in this case, this Court reads sections 362(a)(6), 727(b), and 524(a)(2) in a manner that will preserve the right that § 329(b) implicitly, but necessarily, grants to chapter 7 debtors and their attorneys to agree to the payment of fees after the order for relief.

The history of § 329(b) also supports this Court's interpretation. Congress derived § 329 from a provision that was different from other sections generally applying to creditors. Section 329(b) was derived directly from former Bankruptcy Rule 220, which in turn had been derived from § 60(d) of the 1898 Bankruptcy Act. See 3 Collier on Bankruptcy P 329.LH[1]-[4], at 329-30 to -31 (Lawrence P. King ed., 15th ed. 1996). Originally, § 60(d) n7 did not provide a basis for a court to scrutinize an agreement for future payments; it only permitted it to cancel the unreasonable portion of a payment that the bankrupt had already made to the attorney he employed for prepetition bankruptcy services. n8 See Michelbacher v. Haar (In re Falk), 30 F.2d 607, 609 (2nd Cir. 1929). In most respects, however, it is substantially similar to § 329(b), so cases interpreting § 60(d) shed some light on § 329(b)'s special character. See In re Smith, 48 B.R. 375, 378 (Bankr. C.D. Ill. 1984). Early on, the Supreme Court explicitly recognized that § 60(d) was both administrative in character and sui generis; therefore, a trustee's suit to recover excessive payments to a bankruptcy counsel did not require the procedures necessary for a plenary suit to recover a preference. See In re Wood, 210 U.S. 246, 250-54, 257-58, 52 L. Ed. 1046, 28 S. Ct. 621 (1908). Similarly, the Second Circuit recognized that the object of section 60(d) was to afford the bankrupt representation by counsel, who would not

have to take chances as a general creditor, but might know that a reasonable fee was assured, and hence would be zealous to render active service in what is often a difficult situation.

Michelbacher, 30 F.2d at 609 (emphasis added). Thus, even before the enactment of the Code, courts recognized that employment contracts with debtors' attorneys do not fit comfortably within the scheme designed to regulate payments to general creditors, because the agreement between a debtor and his counsel is fundamental to the success of the bankruptcy case itself and is thus qualitatively different. Because Congress said nothing to indicate it intended to change prior law, § 329(b), like its direct predecessor, § 60(d), ought to be considered a discrete, exclusive regulation of such fee agreements. "When Congress amends the bankruptcy laws, it does not write 'on a clean slate.'" Dewsnup v. Timm, 502 U.S. 410, 419, 116 L. Ed. 2d 903, 112 S. Ct. 773 (1992).

Moreover, § 329 is a specific rule applicable to fee agreements of the kind at issue here. "A general statutory rule usually does not govern unless there is no more specific rule." Green v. Bock Laundry Machine Co., 490 U.S. 504, 524, 104 L. Ed. 2d 557, 109 S. Ct. 1981 (1989). The Code sets forth a very specific set of rules, § 327 through § 331, regulating relationships with professionals employed in connection with a bankruptcy case. These provisions contemplate that attorneys will be involved with bankruptcy cases in numerous capacities, including representation of a trustee in carrying out statutory duties (§ 327(a), § 330(a)(1), § 331); of a creditor's committee (§ 1103(a), § 330(a)(1), § 331); of a trustee in operating a debtor's business (§

327(b), § 330(a)(1), § 331); of a debtor in defending the debtor's legal rights (§ 329, § 330(a)(4)(B), § 331); and of a trustee in utilizing a former debtor's attorney for a special nonbankruptcy purpose (§ 327(e), § 330(a)(1), § 331). These specialized rules trump the more generally applicable rules found in sections 362(a), 524(a)(2), and 727(b). The requirements for compensation in these rules do vary, usually requiring a retention order from the court and a detailed fee application, but as a whole they imply that the attorney will receive reasonable compensation if he complies with them. Attorneys employed by debtors under chapters 11, 12 or 13 do not confront the issue raised in this case because they are entitled to apply to the court for the approval of their compensation and to have that compensation paid by the estate as priority claims. § § 330(a), 503(b)(2), 507(a)(1). Section 329, which is part of this series of rules governing professional employment and compensation, affords attorneys who represent debtors in chapter 7 cases comparable protection and imposes comparable burdens. But the mechanism provided in § 329 fails to achieve its purpose if sections 362(a), 524(a)(2), and 727(b) are held to cover the same ground. This is why the specific must prevail over the general.

For the two decades since the enactment of the Bankruptcy Code, courts have assumed that a chapter 7 debtor's attorney could collect fees from nonestate property. Though not specifically addressing the precise issue presented in this case or the interaction of these sections with sections 362(a), 524(a)(2), and 727(b), numerous courts have clearly evidenced an understanding that for those services not compensable under § 330(a), liability under the prepetition contract between a chapter 7 debtor and his attorney continues

postpetition and can be satisfied with the debtor's postpetition wages and exempt property. See Peale v. Miller, 1996 U.S. App. LEXIS 31260, No. 95-5681, 1996 WL 690158, at *1 (6th Cir. Nov. 27, 1996); In re Friedland, 182 B.R. 576, 577, 579-80 (Bankr. D. Colo. 1995); In re Bennett, 133 B.R. 374, 376 (Bankr. N.D. Tex. 1991); In re Holden, 101 B.R. 573, 577 (Bankr. N.D. Iowa 1989); In re De La Rosa, 91 B.R. 920, 922 (Bankr. S.D. Cal. 1988); In re Ellrich, 81 B.R. 132, 134 (Bankr. S.D. Fla. 1987); In re Hunt, 59 B.R. 842, 843-44 (Bankr. N.D. Ohio 1986); In re Epstein, 39 B.R. 938, 941 (Bankr. D.N.M. 1984); cf. In re Hollis Lumber Co., 55 F.2d 898, 898-900 (2nd Cir. 1932) (interpreting 1898 Bankruptcy Act); In re Bohrman, 224 F. 287, 287-88 (S.D. Ga. 1915) (same).

In other cases, a chapter 7 debtor's attorney required the debtor to personally pay for prepetition bankruptcy services after the order for relief, and no interested party, trustee, or judge had any reservations about the automatic stay or the discharge injunction. See Schroeder v. Rouse (In re Redding), 247 B.R. 474, 475-77 (B.A.P. 8th Cir. 2000) (second payment of $ 4500 approximately two months after the conversion order n9); In re Novitzke, 120 B.R. 483, 484, 486-87 (Bankr. W.D. Wis. 1990); In re Brown, 82 B.R. 869, 870 (Bankr. S.D. Ohio 1987); In re Swartout, 20 B.R. 102, 103, 106 (Bankr. S.D. Ohio 1982) (even mentioning how sections 524(a) and 727(b) would apply to prepetition legal services for a divorce); In re Hill, 5 B.R. 541, 541, 543 (Bankr. C.D. Cal. 1980) (debtor originally gave $ 1500 promissory note in part for filing-preparation services).

In other cases, bankruptcy courts have recognized a chapter 7 debtor's personal contractual liability for

postpetition legal services rendered pursuant to a prepetition contract. n10 See In re Woodcock, 100 B.R. 520, 521, 523-24 (Bankr. E.D. Cal. 1989); Colter v. Edsall (In re Edsall), 89 B.R. 772, 773, 776 (Bankr. N.D. Ind. 1988). Significantly, they noted that a bankruptcy counsel would violate professional rules of conduct by refusing to continue to represent a debtor because of unpaid attorneys' fees, at least if the counsel failed to comply with the local U.S. district court rules for withdrawal. See Woodcock, 100 B.R. at 522-23; Edsall, 89 B.R. at 774-76. These opinions demonstrate that prior to the relatively recent line of cases beginning in 1994, subchapter II of chapter 3 was widely (if implicitly) understood to be a specific, detailed set of rules governing employment contracts with bankruptcy attorneys, and these specific rules pre-empted more general provisions like sections 362(a), 524(a)(2), 727(b), and 523(a).

The Supreme Court in its rule-making capacity has evidenced a similar understanding. Federal Rule of Bankruptcy Procedure 1006(b) permits a debtor to pay the bankruptcy filing fee in up to four installments, the latest of which may not be made payable "later than 120 days after filing the petition"; however, the debtor must pay the filing fee in full before he pays any amount to his bankruptcy counsel. The rule makes no sense if the attorneys' fees cannot be collected postpetition.

The sole purpose of statutory construction is to find legislative intent. Nobody could seriously argue that Congress intended to make it impossible for chapter 7 debtors, but not debtors under the other relief chapters, to enter into agreements with their bankruptcy attorneys providing for payment after the

commencement of the case. Such a result would not further the goal of relieving honest but financially distressed individuals from debt incurred in the past; rather, it would make it more difficult for many debtors to get the fresh start that is the promise of chapter 7. Such a result would, in Judge Posner's word, be "silliness." On the other hand, reading all relevant provisions of the Code in their context as part of a coherent whole, with a view towards fulfilling the overriding purposes of the statutory scheme, leads to the reasonable conclusion that Congress intended that attorney fee agreements be regulated under § 329 and necessarily excluded from the reach of the automatic stay and discharge. Supreme Court and Seventh Circuit authority requires this Court to interpret the Code in this manner.

This Court therefore concludes that the complaint fails to allege any violation of § § 362 or 524. Because no such violation is alleged, there is no basis for a claim of professional negligence under Illinois law. Therefore, this Court will grant the Law Firms' motion to dismiss all counts of the Debtors' complaint for failure to state claims upon which relief can be granted.

ENTERED BY:

Hon. Ronald Barliant
United States Bankruptcy Judge

Dated: March 29, 2002

FOOTNOTES

n1 In Kelly v. Robinson, the Supreme Court did not find that the exception to discharge at issue, § 523(a)(7), was in conflict with any other provision in the Bankruptcy Code, but it still examined the Code's legislative history and the case law under the 1898 Bankruptcy Act in depth.

n2 "(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation. (b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to (1) the estate, if the property transferred (A) would have been property of the estate; or (B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or (2) the entity that made such payment."

n3 Section 502 deals with the allowance of claims against the estate, not claims against the debtor. Section 502 only has relevance when there is a distribution from estate assets to creditors. Claims against the debtor are dealt with in the discharge provisions of § § 523, 524, and 727. The point here is

that under the plaintiffs' theory, § 329 would protect neither the estate nor the debtor.

n4 See, e.g., § 326(a), (b) (limits on trustee compensation); § 327(c) (disqualification of professional persons representing a creditor); § 330(a)(4)(B) (compensation from estate to attorney representing debtors' interests); § 341(d) (specific type of oral examination for a debtor by trustee); § 346(b), (d), (g), (i) (special tax provisions); § 347(a), (b) (disposition of unclaimed property); § 365(d), (o) (assumption and rejection of executory contracts and unexpired leases).

n5 Under the majority rule, the chapter 7 debtor's ability to retain the first law firm for the purpose of carrying out the bankruptcy case in its entirety is already uncertain.

n6 The claim is contingent on the amount of legal services that will be required postpetition.

In the Ninth Circuit, however, following Hines,

a prepetition contract for postpetition legal services does not give the attorney a 'claim' within the meaning of section 101(5)(A). It is the rendition of services that creates the claim, not the execution of a fee agreement. Therefore, if postpetition services are rendered, the attorney does not have a prepetition (hence dischargeable) claim. The attorney may collect his or her fee after the filing of the petition without running afoul of the automatic stay or the discharge injunction.

n7 "If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law . . . for services to be rendered, the transaction shall be re-examined by the court on the petition of the trustee or any creditor, and shall only be held valid [i.e., not a preference under § 60(a)] to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate." Act to Establish a Uniform System of Bankruptcy Throughout the United States, ch. 541, § 60(d), 30 Stat. 544, 562 (1898) (repealed 1978).

n8 Congress amended § 60(d) in 1968 to give the court authority to review the compensation for all services that the debtor's attorney agrees to render in connection with the bankruptcy case. See Lester Brickman & Jonathan Klein, The Use of Advance Fee Attorney Retainer Agreements in Bankruptcy: Another Special Law for Lawyers?, 43 S.C. L. Rev. 1037, 1055 & n.87 (1992).

n9 When a case is converted to a chapter 7 case, the conversion order constitutes the order for relief for purposes of determining what is a prepetition debt under § 727(b). See 11 U.S.C. § 348(b).

n10 As discussed above, bifurcating what is clearly a prepetition contract into prepetition and postpetition components is not consistent with the meaning of a prepetition claim under the Bankruptcy Code.